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THE LAW OF TORTS

A CONCISE TREATISE

ON THE

CIVIL LIABILITY AT COMMON LAW AND UNDER
MODERN STATUTES FOR ACTIONABLE WRONGS
TO PERSON AND PROPERTY

BY

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THIRD EDITION.

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PREFACE.

THE present volume is the result of an endeavor to state, with brevity but with accuracy, the legal principles involved in tort litigations of to-day. While neither the history nor the theory of the subject has been ignored, the discussion of those topics has been subordinated to the exposition of established rules of law.

No attempt has been made at originality in classification. The first six chapters present a sketch of the history of tort development in our law; a statement of the general principles determining tort liability; a brief account of tort remedies, and of the manner in which tort liabilities may be discharged. The remainder of the volume is devoted to a discussion of the most important classes of torts.

The order, in which particular torts have been dealt with, is quite different from that observed by many modern writers. It is not made to depend upon the motive, intent, or state of mind of the wrong-doer, but upon the sort of harm inflicted. Those torts, which are directed principally against the person of the victim, are first considered: then, those which are aimed at his property; and, lastly, those which are clear invasions of both the personal and the property rights of another.

A considerable saving of space has been secured by frequent cross-references. For example, Chapter III, entitled Harms that are not Torts, contains a statement of the principles which excuse or justify acts which are apparently tortious. These principles are not repeated in the chapters, devoted to particular torts, such as Assault and Battery, Trespass and others; but are referred to in frequent foot-notes. Still, the modern dimensions of this book are due not so much to the space-saving device, just mentioned, as to the deliberate purpose of the writer to prepare a hand-book; not a series of monographs, nor a collection of commentaries, nor a digest of all reported decisions. He has sought to aid his brethren of the profession by stating, as concisely as possible, the rules of law on this subject; by expounding the

reasons for such rules, as these are set forth in judicial decisions; by noting the conflict of opinion which exists on many points, and especially, by referring only to those cases which bear directly and helpfully upon the topics to which they are cited. In order to make these citations as useful as possible, recent cases have been preferred to older ones, whenever the discussion of principles and authorities has been equally valuable; reference has been given not only to the official report, but to unofficial publications in which the case has appeared, and the date of each decision is noted.

COLUMBIA UNIVERSITY,
SCHOOL OF LAW,
March, 1905.

PREFACE TO SECOND EDITION.

Two chapters have been added to the original text, dealing respectively with the Tort Liability of Telegraph and Telephone Companies, and with Injunction as a Tort Remedy. Both of these subjects are, at present, prolific sources of legal and political controversy and, it is believed, that the additional chapters will be found useful not only to the practitioner, but to students of law and of political science.

The discussion of each topic has been brought down to the present year, and an attempt has been made to set forth not only the latest decisions of the courts, but to show the trend of current legislation thereon.

Although the original chapters of this work have not been altered, the text and notes have been subjected to a careful revision for the purpose of correcting typographical and similar errors, which were discovered.

COLUMBIA UNIVERSITY,
SCHOOL OF LAW,
September, 1908.

PREFACE TO THIRD EDITION.

WHILE many additions have been made to the original text and notes, the present edition shows no radical changes in scope and method from its predecessors. The work is neither a cyclopedia of cases, nor a collection of monographs on special topics; but an attempt to expound the principles of tort liability at common law, and to note their chief modifications by modern statutes.

Legislative changes have been very radical on some subjects, as well as widely variant in the different States, during the last decade. In such cases, the present edition does little more than outline the main features of the statutes and refer the reader to special treatises thereon. Workmen's Compensation and Employers' Liability Acts are examples of this class.

As a rule, however, statutory modifications of the general rules of tort liability are discussed, and the latest decisions construing such legislation are referred to. It is hoped that most of the important cases in tort law, which have appeared since the publication of the original work, will be found in the notes to the present edition.

COLUMBIA UNIVERSITY,
SCHOOL OF LAW,
May, 1913.

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THE LAW OF TORTS.

INTRODUCTORY CHAPTER.

1. **The Antiquity of Torts:—The Recency of Text Books on Torts.** Although the earliest form of legal liability, known to our Anglo-Saxon and Norman ancestors, was quite similar to the present tort,¹ legal text-books upon tort in English law are very modern. The earliest treatise of value was published in this country, in 1859,² and was followed the next year in England by a larger work,³ which still maintains a leading place among the increasing multitude of books on this fascinating topic. It is true that an attempt was made, as early as 1720, to systematize the case law upon the subject, but it was not very successful.⁴

The volume has been dismissed by eminent authors with brief flings.⁵ Perhaps it deserves their contemptuous comments. It is serviceable, however, as showing the modernness of this branch of English law and the antiquity of the principles upon which it rests. In comparison with recent treatises on Torts it appears fragmentary in the extreme. Although professing to be "a methodical collection of all the cases concerning actions on the case for torts and wrongs," it is limited to five topics. Actions for "Trover

1. "To exact for all injuries both Cases Concerning such Actions. to person and property, a payment (The name of the author is not in money to the person injured, ap- given.)

appears to have been the first form of 5. In the dedicatory letter to Justice Holmes, Sir Frederick Pollock legal liability for injuries to private persons alike in Greece, in refers to this book as "remarkable Rome, and among the Teutonic chiefly for the depths of historical Tribes." Markby's Elements of ignorance which it occasionally reveals." The Law of Torts, First Law, § 600. Ed., p. vi.

2. Hilliard on Torts.

3. Addison on Torts.

4. The Law of Actions on the that the book should be passed over Case, for Torts and Wrongs; Being as though it did not exist. Non-a Methodical Collection of all the contract Law, § 3, n. 1.

and Conversion of Goods," for "Malicious Prosecutions," for "Nuisances," for "Disceits and on Warranties," and "On the Common Custom against Carriers and Innkeepers," cover the entire field of Torts and Wrongs, according to the view of this anonymous author. We know that these were not the only actions for torts which were then in use, and the reports of which were then accessible to the student of English case law. Possibly, however, the five topics discussed in this volume embraced most of the cases which were deemed important, and covered the field of ordinary tort litigation of that period.

Certain it is, that the rules of English law relating to torts had not then been systematized, and that neither the bench nor the bar had any conception of a Law of Torts. They were familiar with various species of civil wrongs, such as assault and battery, false imprisonment, deceit, defamation, nuisance and the like, but they were entirely innocent of any knowledge of legal classification, which would unify these miscellaneous instances and reduce them to a well defined and "individual branch of the law."

2. Beginning of Modern Theory of Torts. Sir Frederick Pollock, writing in 1886,⁶ declared that the really scientific treatment of the principles of torts "begins only with the decisions of the last fifty years." Fifteen years earlier, another writer had asserted that "the English lawyers had not yet made any attempt to define torts."⁷ In 1882, an accomplished and learned judge⁸ of the New York Court of Appeals opened a notable opinion with these words: "We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a border-land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult. The text-writers either avoid a definition entirely, or frame one plainly imperfect, or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes."

6. Pollock on Torts, Dedicatory 670.

Letter, p. vi.

8. Judge Finch in *Rich v. New*

7. Markby's Elements of Law, § York Central Ry., 87 N. Y. 382.

3. Indefiniteness of the Term. Although, during the last thirty years, text-books on torts have multiplied rapidly, and litigations involving the nature of a tort have been well-nigh innumerable, neither a complete theory of torts nor a perfect definition of a tort has yet been attained. A very able and original writer thought to clear up all obscurity of the subject, by extending "torts to the natural partition line in the legal field, and making it Non-Contract Law." In his opinion, "there is not in the entire law any other division so plain and distinct, so completely one subject, so absolutely governed by common fundamental principles, resting in natural reason and recognized by the courts from the earliest dawnings of the common law jurisprudence, and never lost sight of or questioned, as this of non-contract law." These common fundamental principles he summarizes as follows: "In the whirl of life, each must strive to avoid injuring another; then, when this endeavor is made, whether successfully or not, every man must bear without compensation whatever sufferings or losses come to him. Rights of action proceed alone from violations of duty, never from misfortunes."⁹

4. Non-Contract Law. Notwithstanding the very positive assurances of the author, the reader of this book, original as it is in many respects and valuable as it is throughout, will not discover that its scope is much more extensive than that of other leading treatises on torts, nor that all obscurity has vanished and a perfect and simple theory of torts has been presented. Indeed, it is apparent from the author's summary of common, fundamental principles which has been quoted, that simplicity has been attained by resort to vague if not glittering generalities.^{9a}

9. Commentaries on the Non-Contract Law, and especially as to some absolute right to which another is entitled; or (b) in the infringement of some qualified right of another causing damage; or (c) in the infringement of some public right resulting in some substantial and particular damage to some person beyond that which is suffered by the public generally." Salmond's Law of Torts (2nd Ed.) has this definition: "A civil wrong for which the remedy is an action for

Common Affairs not of Contract, or the Every Day Rights and Torts. By Joel Prentiss Bishop, 1889, pp. iv., 616.

^{9a} Underhill's Law of Torts, (9th Ed., p. 7) has the following definition: "A Tort is an act or omission which, independent of contract, is unauthorized by law, and results either, (a) in the infringement of

5. **Thou Shalt Do no Hurt to Thy Neighbor.** Some years before Mr. Bishop set forth his theory of torts, Sir Frederick Pollock had declared that our law of torts, with all its irregularities, has for its main purpose nothing else than the development of this precept of Ulpian, "*alterum non laedere*"—"thou shalt do no hurt to thy neighbor." At the same time he asserted that "a complete theory of torts is yet to seek." He was not satisfied with so broad and vague a statement of general principles as that contained in Ulpian's precept. In the latest edition of this book,¹⁰ the author discloses his dissatisfaction in the following paragraph, which did not appear in the first edition: "*Alterum non laedere* is to forbear from inflicting unlawful harm in general. As the English Church catechism has adopted Ulpian's words, it belongs to my duty towards my neighbor, to hurt nobody by word or deed. To be true and just in all my dealings. But neither the Latin nor English phrase is clear enough to bring out the real, fundamental distinctions implied in the fact that we recognize torts as forming an individual branch of the law." The distinguished author then proceeds to set forth those distinctions somewhat at length, and concludes his account of them with a summary of the ways in which a right of action for a tort can arise in our law, which covers a page and a half of the text.

6. **Other Attempts at Simplification.** Other writers have attempted to simplify this branch of the law by defining a tort as the violation of a right *in rem*,¹¹ and declaring that to avoid committing a tort one need only to forbear.¹² Such statements, admirable as they are for brevity and comprehensiveness, are inadequate, if not misleading.

7. **Tort may be Negative.—Innkeeper.** Not every tort involves an affirmative act. Omission may be tortious as truly as commission.¹³ An honest and respectable traveler enters an inn, calls for

damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation." p. 7.

10. Pollock on Torts, 9th Ed., pp. 2 and 20.

11. Innes, Law of Torts, § 6.

12. Austin, Jurisprudence, Lect. XIV.

13. United Railways v. Deane, 93 Md. 619, 49 At. 923, 86 Am. St. R. 453 (1901); holding that the negligent failure or omission of railroad servants to protect a passenger

lodging and refreshment and tenders the proper price therefor. The innkeeper has unoccupied rooms and abundant supplies, but ignores the guest's demand. He takes no affirmative action. He does not eject the guest, nor does he say a word, nor pay any attention to him. He is simply passive. This omission is an actionable tort. The law imposed upon the innkeeper a duty towards guests, which he has violated. That duty was to receive, and furnish food and lodging at reasonable prices to all travelers presenting themselves in proper condition, so long as he had room and supplies.¹⁴ It was an affirmative duty; a duty that was violated by omitting to act.¹⁵

But it may be said, that had the innkeeper forbore from taking up this semi-public vocation, his failure to receive and provide for the traveler would not have been tortious. Undoubtedly. So had he forbore from being born there would have been no tort by him. The act of becoming an innkeeper simply furnished an occasion for his tort. It had no causal connection with it. There

from the violence of a drunken fellow-passenger, was an actionable tort. "In such cases," said the court, "the negligence for which the company is liable is not the tort of the fellow-passenger, but the negligent omission of the carrier's servants." *Groves v. Wimborne* (1898), 2 Q. B. 402, 67 L. J. Q. B. 862, omission to keep machinery fenced; *Butler v. Fife Coal Co.* (1912), A. C. 149, 81 L. J. P. C. 97, omission to appoint and keep in charge persons competent to deal with dangers arising in a mine. refused to do so, he was liable alike to an indictment and an action by the party aggrieved." *Atwater v. Sawyer*, 76 Me. 539 (1884). In this case, plaintiff applied for dinner at defendant's inn and was refused. He recovered eight dollars damages.

14. *White's Case*, *Dyer* 158b (1693); *Commonwealth v. Mitchel*, *Parsons' Cases* (Pa.), 431 (1850); *Watson v. Cross*, 2 Duvall (Ky.), 147 (1865). In the last case it is said: "Appellant, being an innkeeper, was legally bound to receive and entertain all guests apparently responsible and of good conduct, who might come to his house, and if he 15. *Hawthorn v. Hammond*, 1 C. & K. 404 (1844). This was an action on the case for damages, by reason of not being admitted to defendant's inn at night, after defendant had retired. Plaintiff knocked on the door and called to defendant, who paid no attention to plaintiff's application. Parke, B., in substance charged the jury that if they found the noise was heard by defendant and implied that the persons who made it wanted to be admitted as guests, defendant's failure to admit them was a breach of his common law duty.

was no element of wrongfulness in his taking up the occupation of innkeeper. His tort consisted solely in omitting to perform the affirmative duty of an innkeeper. His forbearance to act was tortious.

8. **Other Examples of Negative Torts**—of torts of omission as distinguished from torts of commission—are afforded by failures to comply with statutory requirements. For instance, a statute imposes upon factory-owners the duty (which did not exist at common law) of attaching certain fire escapes to factories, that are more than three stories in height. The owner of such a factory makes no change in his building, fails to obey the statute. A fire occurs and some of his employees, who could have escaped without the smell of fire on their garments, had the statutory command been obeyed, are badly burned. His omission is tortious. He is liable to an action at law for damages to each of such injured employees.¹⁶ He committed a tort by forbearing to act, as the statute had commanded him to act.^{16a}

9. **Tort may Violate Right in Personam.** Equally unsound with the general proposition that we have just considered, is that

16. *Pauley v. Steam Gauge and Lantern Co.*, 131 N. Y. 90, 29 N. E. 999 (1892). The court held that the statutory requirements (L. 1887, Ch. 462, § 10) "of fire escapes was for the direct and special benefit of the operatives in such factories, and intended for their protection—that the law of 1887 imposed a duty upon the owners or occupants of the prescribed class of factories, for an omission to perform which the operatives injured by the omission might recover damages."

In *Parker v. Barnard*, 135 Mass. 116, 119 (1883), the court said, "When, in the construction of a building the legislature sees fit to direct by statute that certain precautions shall be taken, or certain guards against danger provided, his unrestricted use of his property is

rightfully controlled, and those who enter in the performance of a lawful duty, and are injured by the neglect of the party responsible have just ground of action against him."

In *Billings v. Breinig*, 45 Mich. 65 (1881), it appeared that the law made it incumbent on defendant to exhibit lights on his tugboat at night. He omitted to exhibit them, and such omission was held to be actionable negligence. The defendant's tort did not consist in running his tug at night, but in omitting to do what the law commanded him to do.

16a. *Racine v. Morris*, 201 N. Y. 240, 94 N. E. 864 (1911), giving a liberal construction to the statute, in the victim's favor.

other (often linked with it), that a tort is a violation of a right *in rem*. Many, perhaps most, torts are of this character. On the other hand many a tort is a violation of a right *in personam*.¹⁷

10. **Right of Guest against Innkeeper.** Such it is submitted is the tort of the innkeeper in the case mentioned above. The traveler's right to entertainment is not a legal right available against all the world. He may be ever so honest and respectable, his wallet may be overflowing with money. He may be weary and hungry to fainting. But, he has no legal right to demand from any and every householder along his route lodging and refreshment. This right is available only against such persons as have voluntarily become innkeepers. Nor is it an absolute right against every innkeeper. Whether the traveler has a legal right to be received and cared for as a guest, depends upon the plight of the inn when he presents himself. If it is full of guests, the innkeeper may ignore the traveler's request for entertainment, and may even turn him curtly away, without violating any right of the jaded and famished traveler.¹⁸

11. Right of Shipper. Again, the tort committed by the common carrier, who neglects to receive or care for goods tendered to

17. " There are rights vested in certain determinate persons which are *in personam*, that is, which are available only against a determinate person or persons. Corresponding to them are duties laid on the determinate person or persons against whom the right avails as distinguished from the rest of the community. * * * These rights are sometimes acquired as the immediate consequence of duties imposed on determinate persons towards certain other determinate persons by whom they are acquired. The breach of the duty involves the violation of the right, and is a tort. * * * We have therefore two distinct sets of rights. The first, the three great fundamental rights, which are *in rem*; and which are rights not to be damaged in person, reputation, or property by any wrongful act; the duty being to forbear from violating them. The *injuria* is here found in the violating act causing the damage. The second, the special modifications of the three fundamental rights, which spring out of certain relations in respect of which the law fixes certain duties; the modifications being made in respect of certain given individuals on whom the duties, modified to correspond, are laid; being in respect of certain individuals, they are *in personam*." Piggott's Law of Torts, pp. 6, 13.

18. *Atwater v. Sawyer*, 76 Me. 539, 49 Am. R. 634 (1884); *Rex v. Ivens*, 7 C. & P. 213 (1835); *Schouler on Bailments* (3 Ed.), § 318; *Browne v. Brandt* (1902), 1 K. B. 696, 71 L. J. K. B. 367.

him for carriage, is not the violation of a right *in rem*. The right of the owner to have his goods carried is not one available against the world; it is available only against a particular person, who has voluntarily subjected himself to the common law duty to receive and carry, by holding himself out as a common carrier of such goods.¹⁹ Moreover, the right is not an absolute one, even against such a person. If the latter's means of transportation are fully occupied he may refuse the goods in question, without committing a tort.²⁰

Innkeeper. Yet again, the innkeeper, who fails to keep safely his guest's property committed to his care, is liable to a tort action unless the loss is due to an act of God, or to the public enemy or the guest's fault. Such, too, is the liability of the common carrier for goods which he has received for transportation. Torts of this kind are not violations of rights *in rem*. Neither the guest nor the owner of the goods has a right against the world, to have his property kept safely. If he delivers it to an ordinary bailee for hire, his right is to have it guarded with ordinary care.²¹ Any loss or injury not chargeable to the active misconduct or the ordinary negligence of the bailee, must be borne by himself. On the other hand, the innkeeper or the common carrier who receives this property pursuant to his vocation becomes substantially the insurer of its safety.²² As soon as the relationship between guest and innkeeper or carrier is created, the guest or shipper acquires a legal right against the particular innkeeper or carrier, to have this property kept safely. This relationship, it is to be borne in mind, is a conventional one; it is the result of a contract between the

19. In *Allen v. Sackrider*, 37 N. Y. 341 (1867), it is said, "No one can be considered as a common carrier, unless he has in some way held himself out to the public as a carrier in such manner as to render himself liable to an action if he should refuse to carry for anyone who wished to employ him." "In effect, refusing to enter into the appropriate contract is of itself a tort." Pollock on Torts (8th Ed.), 548.

20. *Lovett v. Hobbs*, 2 Shower, 127 (1681); Schouler on Bailments (3 Ed.), § 377. He may refuse, also, if a mob prevents him from doing business. *Pittsburgh & C. Ry. v. Hollowell*, 65 Ind. 188, 32 Am. R. 63 (1879).

21. *Maynard v. Buck*, 100 Mass. 40 (1868); *Hexamer v. Sonthal*, 49 N. J. L. 682 (1887).

22. *Mason v. Thompson*, 9 Pick. 280, 20 Am. Dec. 471 (1830).

parties.²³ To say that the right which the common law confers upon the guest or the shipper, as an incident of such contract, is a right *in rem* is certainly to wrench that term from its true signification. The right of the guest or the shipper to have particular property kept safely by a particular innkeeper or carrier with whom he has contracted, partakes far more of the nature of a right *in personam*, than of a right *in rem*. The tort liability of the innkeeper or the carrier of goods insecurely kept, which have been committed to his care, is said to spring out of contract.²⁴ But for the contract between the parties, the omission of the carrier²⁵ or the innkeeper to save the property from harm, unless that omission were willful or negligent, would not be tortious.

12. **Agent as Tort Feasor.** Of the same character is the tort of an agent who understates the price that has been offered for his principal's property, and appropriates to his own use the difference between the price stated and the price paid. Dealing with a case of this character, Chief Justice Holmes, speaking for the Supreme Judicial Court of Massachusetts, declared: "It is true that, but for the contract of agency, the concealment and misrep-

23. *Bradley Livery Co. v. Snook*, 66 N. J. L. 654, 50 At. 358 (1901). Said the court in this case: "The liability of the innkeeper for the property of his guest placed in his care arises out of an express or an implied contract of bailment. Such contractual relation can only arise where it is apparent, under the facts, that such was the intention of the parties. A contract, of course, may be implied from the circumstances, as well as established by an actual agreement. In order to raise an implied contract of liability on the part of an innkeeper for the goods of his guest lost or stolen, it must at least appear that the guest placed the same in his care and keeping."

24. *Rich v. New York Central Ry.*, 87 N. Y. 382 (1882); *Hutchinson on Carriers* (2d Ed.), §§ 738-740.

25. Cf. *Turner v. Stallibrass* (1898), 1 Q. B. 56, holding that an action founded on the common law liability of a bailee is an action founded on tort. Collins, L. J., said: "An agreement of minds is presupposed in the case of any relation which brings about the common law liability of a bailee to his bailor. Where such relation is established, the result of the cases appears to be that, if the plaintiff can maintain his action by showing the breach of a duty arising at common law out of that relation, he is not obliged to rely on a contract within the meaning of the rule" (relating to costs under a modern statute). To similar effect is *Carpenter v. Walker*, 170 Ala. 659, 54 So. 60, 25 Ann. Cas. 863, with note (1910), action in tort against physician for malpractice.

resentation might not be a tort. But there are other cases in which a tort is said to spring out of a contract.—Whether an act is tortious or not always depends upon the circumstances of course, and it hardly needs remark that the circumstance of confidential relations should give wrongful character to an act that in a different situation—for instance that of a buyer—would be untouched by the law.”²⁶ In other words, the right of the principal which was violated by the agent was not a right *in rem*, but one *in personam*—a right born of the contract of agency between these two parties.^{26a}

13. Torts Springing Out of Contract. The same doctrine was laid down sixty years earlier, in a leading English case²⁷ by Chief Justice Tindal. “That there is a large number of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently either assumpsit, or case upon tort, is not disputed. Such are actions against attorneys,

26. *Emmons v. Alvord*, 177 Mass. 466, 59 N. E. 126 (1901). In this case the agent told his principal that the best offer he could get for certain real estate of the principal was \$3,000 cash and three lots of land. This offer was accepted by the principal, who deeded the real estate to the offerer and received the money and three lots aforesaid. In fact, the offer was \$3,000 in cash and six lots, and the three lots not conveyed to the principal were conveyed by the offerer to a third person, who was supposed by the offerer to be an agent of the offeree, but who was a tool of the agent. Chief Justice Holmes' intimation is, that had a purchaser told the seller that he was buying to sell again, and that all he could get from a third party with whom he was treating for its purchase, was \$3,000 and three lots, when in fact the third party was ready and willing to give \$3,000 and six lots, and did give that price to the first purchaser for the property, such falsehood, though inducing the first seller to transfer the property for less than he could have obtained, had he stood out for more, would not have amounted to a tort.

26a. In *Sandoval v. Randolph*, 222 U. S. 161, 32 Sup. Ct. 48 (1911), the principal was allowed to sue in assumpsit, and was not limited to an action in tort. In *Kuntz v. Tonnelle*, 80 N. J. Eq. 373, 84 At. 624 (1912), the third person who helped the agent cheat his principal was held liable, following *Mayor, etc., of Salford v. Lever* (1891), 1 Q. B. 168, 60 L. J. Q. B. 39.

27. *Boorman v. Brown*, 3 Q. B. (Ad. & E. N. S.) 511 (1842), affirmed in the House of Lords, 11 Cl. & F. 1 (1844); *Bretherton v. Wood*, 3 Brod. & Bing. 54 (1821), *Milford v. Bangor Ry. & Elec. Co.*, 104 Me. 233, 71 At. 759 (1908), accord.

surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render; actions against common carriers, against ship-owners on bills of lading, against bailees of different descriptions; and numerous other instances occur in which the action is brought in tort or contract, at the election of the plaintiff. And as to the objection, that this election is only given when the plaintiff sues for a misfeasance and not for a non-feasance, it may be answered that in many cases it is extremely difficult to distinguish a mere nonfeasance from a misfeasance. But further, the action of case upon tort very frequently occurs where there is a simple non-performance of the contract, as in the ordinary instance of case against ship-owners, simply for not safely and securely delivering goods according to their bill of lading. * * * The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort.”²⁸

28. That the non-performance of a defendant's tort consisted in its failure to keep its passenger waiting-room properly heated in winter. In *Missouri, Kans. etc. Ry. v. Wood*, 95 Tex. 223; 66 S. W. 449 (1902), the company's tort was its failure to prevent a small-pox employee from escaping while delirious and infecting plaintiff. In *Western Union Tel. Co. v. Snodgrass*, 94 Tex. 284, 60 S. W. 308, 86 Am. St. R. 851 (1901), a telegraph company was held liable for failure promptly to deliver a message, even though no contract obligation was established; the court holding that the company was under a legal duty to receive and promptly deliver the message. See Chap. XVI, *infra*.

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by common law, subjects the non-feasor to a tort action was held in the following recent cases: *Jones v. Rochester Gas & Electric Co.*, 168 N. Y. 65, 60 N. E. 1044 (1901),—an action for the statutory penalty, but the court declares that this was not plaintiff's sole means of redress. Defendant's refusal or neglect (see N. Y. Transportation Law, § 65), to comply with plaintiff's demand for illuminating gas was a tort. *Wamsley v. Atlas Steamship Co.*, 168 N. Y. 533; 61 N. E. 896 (1901). *The Elizabeth*, 114 Fed. R. 757 (1902). In *St. Louis, Iron Mountain, etc., Ry. v. Wilson*, 70 Ark. 136; 66 S. W. 661 (1902), de-

CHAPTER II. }

NATURE OF A TORT.

14. Its Chief Characteristics. Without attempting to frame a perfect definition of tort—a task which appears thus far to have been beyond the power of the English speaking lawyer—we shall be content with describing its leading characteristics. These may be stated briefly as follows:

A tort is an act or omission which unlawfully violates a person's right created by the law, and for which the appropriate remedy is a common law action for damages by the injured person.¹

It will be observed that the right violated is private, not public. This differentiates tort from crime. Again, the right is created by the law, not by the agreement of the parties. This is the broad distinction between tort and breach of contract. Still again, the violation of this legal right must be remediable by a common law action for damages. If the redress for the unlawful act or omission had to be sought in a court of equity, or of admiralty, or in an ecclesiastical tribunal, and depends upon principles peculiar to those jurisdictions, the wrong was not accounted a tort by English common law.^{1a} This limitation still attaches to the term, even in

1. In 12 Harv. L. Rev. 335, the following is proposed by Frederick H. Cook, as a new definition of tort: "An act or omission, not a mere breach of contract, and producing injury to another, in the absence of any existing lawful relation of which such act or omission is a natural outgrowth or incident."

1a. Illustrations of such wrongs respectively are afforded by a breach of trust, refusal to pay salvage, adultery of husband or wife. It is to be borne in mind, however, that many torts were, and still are cognizable by admiralty courts, but the legal principles applicable to such cases are those of the common law. Cases of assault and battery, or other personal injury on board a ship on the high seas, are within the jurisdiction of admiralty courts, but they are decided in accordance with common law doctrines. See *Stern v. La Campagne Generale Transatlantique*, 110 Fed. R. 996 (1901). *The Willamette Valley*, 71 Fed. 712 (1896). A full discussion of admiralty jurisdiction over vessels for negligent injury to property, attached to the land, will be found in *The Blackheath*, 195 U. S. 361, 25 Sup. Ct. 46 (1904). That this jurisdiction is not exclusive, but that the

jurisdictions where ecclesiastical courts have been shorn of their cognizance of civil wrongs, and where the courts of common law and of equity have been consolidated. Let us consider these three peculiarities of tort more fully.

15. Tort is Distinguishable from Crime. The same act or omission may subject the actor or the omittor to a criminal prosecution and to a civil action for damages. In other words, a single act or omission may unlawfully violate a private right and a public right. Its violation of the former is a tort: its violation of the latter is a crime. For instance, A, without justification or excuse attacks B and knocks him down. He has violated B's right to personal security and is liable to an action by him in tort for damages. He has also violated a right of the State, by his breach of the peace and by the injury inflicted upon one of its citizens, thus rendering himself liable to a criminal prosecution by the State.²

This differentiation of the tortious from the criminal characteristics of the same act is comparatively modern. "The early tendency was * * * to treat offenses against individuals, even when, like theft and homicide, they were a serious menace to the general welfare, as merely civil injuries to be compensated for by damages."³ After the idea was clearly grasped that the same

injured party may sue at common law for damages, is held in *Martin v. West*, 222 U. S. 191, 32 Sup. Ct. 42 (1911). being redressed by the civil, while the latter is punished by the criminal courts. But the distinction lies deeper, and is well expressed by

"Admiralty courts, being free to work out their own system and to finish the adjustment of maritime rights, have jurisdiction of an action for contribution for damages paid to third parties as the result of a collision for which both vessels were in fault. The claim is of admiralty origin," *Erie Ry. Co. v. E. & W. Transp. Co.*, 204 U. S. 220, 27 Sup. Ct. 246 (1907). Blackstone, who says that torts are an infringement or privation of the private or civil rights belonging to individuals; crimes are a breach of public rights and duties which affect the whole community. The right which is violated by a tort is always a different right from that which is violated by a crime. The person of inherence in the former case is an individual, in the latter case is the State." Holland's *Jurisprudence* (10th Ed.), 320.

2. "It is sometimes alleged by books of authority that the difference between a tort and a crime is a matter of procedure, the former

3. Holland's *Jurisprudence*, (10th Ed.), 367.

act might be injurious to the State as well as to the individual, and ought to subject the wrongdoer to criminal punishment as well as to the payment of damages to his victim, English courts found themselves perplexed over the relation of these two sets of proceedings. Should the criminal prosecution have precedence over the civil action, or should each proceeding be allowed to progress without hindrance from the other?

16. Merger of Tort in Felony: In England. In the earliest reported case,⁴ dealing with this question we have the following statement: "If a man beats the servant of J. S. so that he dies of the battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery it is now become an offense to the crown, being converted into a felony, and that drowns the particular offense and private wrong offered to the master before, and his action is thereby lost."⁵

From this time on we find dicta in judicial opinions, in digests, and in text-books to the effect, that when an act constitutes a felony as well as a tort, the tort is merged in the felony. There is no express decision of an English court enforcing this doctrine, however, and after undergoing several modifications,⁶ "it seems, if not altogether exploded, to be only awaiting a decisive abrogation" in England.⁷

17. Same in America. It has never received judicial sanction in this country,⁸ although judges have shown readiness to adopt a

4. *Higgins v. Butcher*, Yelv. 89 (1606).

5. According to the reports of this case in Noy. 13 and 2 Rolle's Abridg. 575, the only point decided was that an action of trespass for causing the death of plaintiff's wife, could not be maintained by the husband after her death, the cause of action having died with her.

6. See Lord Blackburn's historical sketch of the doctrine: *Wells v. Abrahams*, L. R. 7 Q. B. 554, 560-563 (1872).

7. *Pollock on Torts* (9th Ed.), 205.

8. *McBlain v. Edgar*, 65 N. J. L. 634, 48 At. 600 (1900), and cases therein referred to. As early as 1801 the legislature of New York enacted that the private remedy in tort should not be merged in, nor in any way affected by the felony, ch. 60 L. 1801, § 19. Continued in R. S. p. 111, ch. 4, T. 1, § 20, now repealed and continued by Penal Law, § 23, and by § 1899 of the Code of Civil Procedure; *Mairs v. Bal. & O. Ry.*, 175 N. Y. 409, 67 N. E. 901

modification of the doctrine, viz., that all civil remedies in favor of a party injured by a felony are suspended until after the termination of a criminal prosecution against the offender.⁹ They rested their decisions upon considerations of public policy, asserting that "the public good requires that offenders should be brought to justice; and if a civil remedy in favor of a party injured, is postponed until a public prosecution has terminated, he will be stimulated to effect this as soon as possible."¹⁰ These reasons have not met with approval, however, and the great majority of our judicial tribunals have held that "for an act which happens to be both a public and private wrong the public and the party aggrieved each has a concurrent remedy, the former by indictment, and the latter by an action suited to the particular circumstances of his case."¹¹

A distinguished judge of the Court of Appeals of Virginia, after tracing the history of the rule of England, declared; "I am persuaded that the object of promoting the prosecution of crimes, would be more promoted by allowing the injured individual to prosecute his civil action uninterruptedly, and thus expose all the circumstances of the transactions to the officers of the law, who are bound *ex officio* to prosecute for the public, than by holding out strong inducements to both parties, to compound the felony, by throwing impediments in the way of the civil remedy."¹² The Supreme Court of New Hampshire has characterized the English rule as one having no practical use in any country, and has asserted the belief "that if the civil action and the criminal prosecu-

(1903). See General Laws R. I. (1854), the rule was rejected in 1909, chap. 283, § 16, following the Massachusetts.

New York rule and modifying chap. 10. *Boody v. Keating*, 4 Greenleaf, 233, § 16 of General Laws, as applied in *Baker v. Power Co.*, 14 R. I. 531 (1884), and other cases.

9. *Talbot v. Frederickson*, Metcalf's Yelverton, 90 (1813), a *nisi prius* decision of Chief Justice Sewall of Mass. In *Boardman v. Gore*, 15 Mass. 336, 338 (1819), Chief Justice Parker doubted the propriety of this rule, and in *Boston & Worcester Ry. v. Dana*, 1 Gray 83

1844, chap. 102, now R. S. 1903, chap. 121, § 15; *Nowlan v. Griffin*, 68 Me. 235 (1878).

11. *Foster v. The Commonwealth*, 8 W. & S. (Pa.) 77 (1844); *Ballew v. Alexander*, 25 Tenn. (6 Humph.) 433 (1846).

12. *Allison v. Farmers' Bank*, 6 Rand. (Va.) 204, 226 (1828).

tion go forward together, the public justice will not sustain any detriment whatever from that circumstance;" while "to compel the injured party to wait until the prosecution for the offense is ended before he can commence an action must be, as is very well known, in most cases to deny all remedy."¹³

18. The distinction between a tort and a breach of contract is broad and clear, in theory. In practice, however, it is not always easy to determine whether a particular act or course of conduct subjects the wrongdoer to an action in tort, or merely to one for a breach of contract. The test to be applied is the nature of the right which has been invaded. If this right was created by the agreement of the parties, the plaintiff is limited to an action *ex contractu*.¹⁴ If it was created by law he may sue in tort. A few cases in addition to those cited in the last note, will illustrate the difficulty experienced by lawyers in applying this test.

Plaintiff brought an action of tort in the nature of deceit, alleging that he had been induced by false statements of the defendant to enter into a contract for building thirty miles of the Florida Railway. These statements were, that the defendant had purchased a certain quantity of rails at a certain price, and would sell them to plaintiff at the same price, if the latter would enter into the contract to build this section of the road. Plaintiff further alleged that defendant had not purchased any rails, and did not sell and did not intend to sell any rails to the plaintiff; that by reason of the contract into which the latter was induced to enter, he was obliged to purchase a larger number of rails at a higher price than that named by the defendant, to his great injury. Such allegations, the court held,¹⁵ did not state a cause of action in tort.

13. *Pettingill v. Rideout*, 6 N. H. 454, 456 (1833); *Quimby v. Blackey*, 63 N. H. 77, 79 (1884). "an action for false and fraudulent representations can never be maintained upon a promise or a prophecy."

14. *Insurance Co. v. Randall*, 74 Ala. 170, 178 (1883); *Junker v. Blanchard*, 69 N. H. 447, 43 At. 637 (1898), defendant's statement "I can safely promise you that our dealings, if you wish to continue them, will be more satisfactory than last season," was held to be a promise and not a tortious misrepresentation. Cf. *Industrial and Gen. Barnes*, 64 Fed. 80 (1894), it is said

15. *Dawe v. Morris*, 149 Mass. 188, 21 N. E. 313, 14 Am. St. R. 404 (1889). In *Union Pacific Ry. v. Barnes*, 64 Fed. 80 (1894), it is said

The only legal right of plaintiff which defendant invaded was the right to have defendant supply him with the agreed quantity of rails at the agreed price. That was a contract right only. Had defendant supplied the rails at the agreed price, the false statement of defendant that he had bought the rails at a specified price would have worked no injury to the plaintiff. In other words, such statement, when separated from the promise, is seen to be legally unimportant and immaterial and not in any way the cause of damage to the plaintiff. Whatever legal injury the plaintiff sustained was due to defendant's non-performance of his agreement. Such non-performance was the only legal wrong committed by the defendant.^{15a}

19. **Bigby v. United States:** At the opposite extreme from the foregoing case may be placed the following: The plaintiff, while on his way to the marshal's office in the post-office building in Brooklyn, was injured by the incompetence of the person in charge of the elevator. The building and elevator were owned by the United States, and the person in charge of the elevator was an employee of the federal government. Redress was sought against the United States, under a statute which permits recovery "upon any contract expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort." Plaintiff's theory was, that the United States entered into an implied contract¹⁶ with him to carry him safely in the elevator, and for a breach of this obligation the government was liable in a contract action. But the court held that the plaintiff was a mere licensee; that the United States entered into no contract either expressed or implied to carry him safely;

eral Trust Co. v. Tod, 170 N. Y. 233, 63 N. E. 285 (1902), tort, citing for the last proposition, **Langford v. U. S.**, 101 U. S. 345; **Hill**

^{15a.} **Accord, Knowles v. Knowles** v. U. S., 149 U. S. 593, and **Schilling v. U. S.**, 155 U. S. 163. 25 R. I. 464, 56 At. 775 (1903).

^{16.} In **United States v. Lynah**, 188 U. S. 445, 23 Sup. Ct. R. 349 (1903), it is held that when the federal government appropriates property which it does not claim to own, there is an implied contract that it will pay the owner its value; while if it claims ownership of the thing appropriated its appropriation is a contract action against the United States for such compensation. **U. S. v. Palmer**, 123 U. S. 262, 9 Sup. Ct. 104, 32 L. Ed. 442 (1888). When a patentee consents to the use of his patents by the government, with the expectation of receiving compensation therefor, he can maintain a contract action against the United States for such compensation.

that whatever duty of care the United States owed to the plaintiff, or whatever right to care the plaintiff possessed against the United States was created by law; that the duty was the same as that imposed by law upon the owner of the building which he permitted the public to enter and use for the purpose for which it was intended—"the duty to use ordinary care that facilities offered to its licensees should be in a state of reasonable safety," that "a breach of such duty would constitute culpable negligence," and hence that plaintiff's cause of action must be in tort; that it could not be for breach of contract.¹⁷

20. Plaintiff's Option to Sue in Contract or Tort: Between the classes, of which the two preceding cases are representatives, is a numerous and extensive class, where the plaintiff is entitled to sue either in contract or in tort, because the defendant's act is an unlawful interference with the right of plaintiff which is created by agreement between them, and also with a right which is created by law. Several examples of this class have been given already, in discussing the liability of common carriers,¹⁸ innkeepers,¹⁹ and agents.²⁰ These could be multiplied many times; but a few additional illustrations will suffice for the present.

The bailee of a horse, which is injured through his negligence, may be sued either for breach of his contract to treat the horse with ordinary care or for breach of his legal duty to so treat him.²¹

17. *Bigby v. United States*, 103 Fed. 597 (1900), 188 U. S. 400, 23 Sup. Ct. 468 (1902), cf. *Stevenson v. Love*, 106 Fed. 466 (1901), in which the court held that plaintiff's cause of action was for slander of title and not for breach of contract. So, if a common carrier receives A as a passenger and his luggage, pursuant to a contract with B for their transportation, A's action against the carrier for the loss of his luggage is properly in tort. *Marshall v. York, Newcastle, Etc., Ry.*, 11 Com. Bench 655 (1851). Cf. *Gladwell v. Steggall*, 5 Bing. N. C. 733 (1839), holding that an action by an infant against a physician for mal-practice, where the hiring was by the infant's mother, was properly *ex delicto*.

18. *Supra*, ¶ 13, citing *Boorman v. Brown*, 3 Q. B. (Ad. & E. N. S.) 511 (1842); *Holden v. Rutland Ry.*, 72 Vt. 156, 47 At. 403 (1900).

19. *Supra*, ¶ 11, citing *Bradley Livery Co. v. Snook*, 66 N. J. L. 654, 50 At. 358 (1901).

20. *Supra*, ¶ 12, citing *Emmons v. Alvord*, 177 Mass. 466, 59 N. E. 126 (1901).

21. *Pelton v. Nichols*, 180 Mass. 345, 62 N. E. 1 (1902); *Turner v. Stallibrass* (1898), 1 Q. B. 56, 67 L. J. Q. B. 52.

an infant against a physician for

'A bank, which fails to honor its customer's check without lawful excuse, breaks its contract with the customer and also violates a duty imposed upon it by law. Accordingly the customer may sue either on the contract or for the tort.²² A grantee of land who, after giving a bond and mortgage on the premises to the grantor to secure a part of the purchase price, sells and conveys the land to a *bona fide* purchaser as unencumbered, and thus enables the latter to hold it free from the mortgage which had not been recorded, is of course liable in contract on the bond; but he is also liable in tort to the mortgagee for wrongfully depriving him of his lien on the land.²³ Yet again, the payee of a note induces the plaintiff to sign it as a co-principal with the original maker by promising not to so use it as to make plaintiff liable for its payment. Thereafter he does negotiate it before due to a *bona fide* purchaser, who compels plaintiff to pay the note. The payee has broken his promise to plaintiff, but he is also liable in tort for his fraudulent use of the note with its consequent damage to plaintiff.²⁴

If, however, the contract between the maker and payee imposes no legal duty on the latter to refrain from negotiating the note, he will not be liable in tort for negotiating it and thus subjecting the maker to a liability which the payee could not enforce against him.^{24a}

21. Advantage of Suing in Tort: When a person is entitled to the option of suing another either in contract or in tort, it is

22. *Davis v. Standard Nat. Bank*, 24 N. E. 381 (1890); *Nashville Lum-50 App. Div. (N. Y.) 210 (1900); At-ber Co. v. Fourth Nat. Bank*, 94 *lanta Nat. Bank v. Davis*, 96 Ga. 734, Tenn. 374, 29 S. W. 368 (1895).

23 S. E. 190, 51 Am. St. R. 139 **24a.** *Haynes v. Rudd*, 102 N. Y. (1895); *Schaffner v. Ehrman*, 139 372, 7 N. E. 287, 55 Am. R. 815, Ill. 109, 28 N. E. 917 (1891); *Patter- (1886); Koepke v. Peper (Ia.)*, 136 son v. Marine Nat. Bank, 130 Pa. St. N. W. 902 (1912). The notes grew 419, 18 At. 632 (1889); *Marzetti v. out of illegal transactions between Williams*, 1 B. & Ad. 415 (1830). maker and payee. Hence, they could

23. *Conley v. Blinerby*, 20 Misc. not be enforced by payee against (N. Y.) 371 (1899). the maker, and an agreement by

24. *Jones v. Crawford*, 107 Ga. the payee not to negotiate the note 325, 33 S. E. 51 (1889); cf. *Met. Ele- would have been equally unenforce- vated Ry. v. Kneeland*, 120 N. Y. 134, able.

ordinarily to his advantage to elect the tort action.^{24b} In the case of the bank above referred to, if the customer sues in tort, he is entitled to substantial damages without proof of actual damage²⁵ certainly if he is a trader,²⁶ while if he sues for a breach of contract to honor his check, his recovery will be limited to a nominal sum, unless he proves actual damage.²⁷ A plaintiff, suing in tort, may be entitled to arrest the defendant, or to attach his property, and, after judgment, to issue an execution against his body, when he could not have had recourse to any of these remedies, had he elected to sue in contract. Moreover, his right of action for breach of contract may be limited by some stipulation in the contract, which limitation he may escape by resorting to a tort action. For example, plaintiff shipped certain goods by an express company to one who had bought them on credit, accepting a bill of lading which limited the company's liability in case of loss to fifty dollars, at which the property, it was expressly declared, was valued by the contracting parties.²⁸ Learning that the consignee was in-

24b. *Milford v. Bangor Ry. & E. St. R.* 523 (1896); *J. M. James Co. v. Co.*, 104 Me. 233, 71 At. 759 (1908); *Continental Nat. Bank*, 105 Tenn. 1, *Hillsdale C. & C. Co. v. Penn. Ry.*, 58 S. W. 261 (1900); *American Nat. Bank v. Morey*, (Ky.), 69 S. W. 759 (1902). In the last case, the court held that plaintiff was not entitled to punitive damages, in absence of proof that the bank acted maliciously. *27. Brooke v. Tradesman's Nat. Bank*, 69 Hun (N. Y.), 202 (1893); *Burroughs v. Tradesman's Nat. Bank*, 87 Hun 6 (1895); affirmed, without opinion, 156 N. Y. 663, 50 N. E. 1115 (1898).

25. *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S. E. 190, 51 Am. St. R. 139 (1895), in which case plaintiff was awarded \$200 as damages for the bank's careless refusal to pay a check of \$12.48, although he gave no evidence of actual damage to his credit.

26. *Bank v. Milvain*, 10 Vict. L. R. 3 (1884); *Bank of Commerce v. Goos*, 39 Neb. 437, 445, 23 L. R. A. 190 (1894); *Svendsen v. State Bank*, 64 Minn. 40, 65 N. W. 1086, 58 Am.

28. *Rosenthal v. Weir, President*, 170 N. Y. 148, 63 N. E. 65 (1902). It is to be noted that defendant's tort in this case was negative. "Defendant's line did not extend to Dallas, but ended at Kansas City, and the delivery complained of was made by the connecting company. Therefore, there was in fact no conversion by the defendant, but its fault

solvent, plaintiff gave notice of stoppage *in transitu* to the express company, but by reason of its negligent failure to properly notify the connecting carrier to whom it delivered them, the goods were not stopped and returned to plaintiff, but were handed over to the insolvent purchasers. For the damages thus sustained plaintiffs sued the company in tort, and were met with the limitation clause of the contract. But the court held, that as plaintiffs had founded their action on the tortious negligence of the defendant, and not on the contract of carriage, the contract limitation did not modify plaintiffs' common law right to recover the actual value of the goods.^{28a}

22. Disadvantage of Suing in Tort. While ordinarily it is advantageous to the plaintiff to elect a tort rather than a contract remedy, it is not always so. In some jurisdictions, it is held that a person, who has the option to sue a telegraph company in contract or in tort, for its failure to deliver a message, may recover damages for mental suffering and anguish if he chooses the contract action; while he may not, if he sues in tort, unless in the latter case he alleges and proves actual injury to his person, reputation or property.²⁹

Again, a plaintiff may have greater difficulty in establishing his cause of action in tort, than in contract. Such was the experience of the plaintiff in a leading New York case³⁰—a case worthy of careful study, not only because of this element, but because of its clear analysis of the nature of a tort. While the facts of the case are many and complicated, the following statement is believed to be full enough to bring out the point now under consideration.

lay in its failure to properly notify the connecting carrier. The action was, therefore, necessarily brought in its present form and not for conversion." (170 N. Y., p. 154.)

^{28a.} Accord, *Lovell v. Boston & Me. Ry.*, 75 N. H. 568, 78 At. 621 (1910), the contract was void, because made on Sunday in Vermont; hence the contract limitation on amount of defendant's liability did not avail him in a tort action.

^{29.} *Western Union Tel. Co. v. Krichbaum*, 132 Ala. 535, 31 So. 607 (1902); *West. U. T. Co. v. Wilson*, 93 Ala. 32, 9 So. 414, 30 Am. St. R. 23 (1890). This is another example of a negative tort.

^{30.} *Rich v. New York & C. Ry.*, 87 N. Y. 382 (1882); cf. *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840 (1901), a conspiracy case.

23. Rich v. Railroad. Plaintiff was the owner of land near defendant's depot on Main street in the city of Yonkers; and also of land on the Nepperhan river. Defendant changed its depot to another part of the city, thus depreciating the value of plaintiff's Main street property, which was heavily mortgaged. It wished to dispense with a draw over the Nepperhan and substitute for it a solid bridge. Plaintiff objected to this unless defendant paid him for the damage the bridge would inflict upon his Nepperhan property. Defendant informed plaintiff that unless he consented to the construction of the permanent bridge, it would continue its depot at the new site. Plaintiff was thus forced to choose between surrendering his riparian rights on the Nepperhan, and allowing his Main street property to be lost by depreciation and mortgage foreclosure. He chose the former alternative, and entered into a contract with defendant, by which he surrendered all riparian rights, in consideration of its agreement, "as soon as practicable, and within a reasonable time to build and forever maintain its principal passenger depot for Yonkers" on the Main street site. Defendant proceeded to build the depot, and, a few months later had it ready for use. Meantime, it had asked the city of Yonkers for permission to close Main street and to fence in its new depot. Plaintiff insisted that this change would damage his property to the extent of fifty thousand dollars, and the city refused defendant's request, because of the heavy damages the city would have to pay. Defendant then announced, that it would never occupy the new depot for passenger use, until the permission was granted. It then, according to plaintiff's allegations, planned a fraudulent scheme for the accomplishment of its purpose. This scheme included a deliberate breach of its contract to restore the depot to Main street; a public refusal to occupy and use it in order to depreciate plaintiff's mortgaged property and make the mortgagee feel insecure; and also a direct instigation of the latter, by the defendant, to foreclose the mortgage, cut off plaintiff's interest in the property and execute a release from damages. As soon as this scheme was consummated, and the permission was granted by the city of Yonkers, defendant opened and used its new depot.

That the defendant had broken its contract with plaintiff was clear. Had the latter sued for such a breach, the task of proving his case would have been easy. He chose, however, to sue in tort,

and found his way beset with difficulties. The trial court refused to permit him to prove the contract or its breach, because he was not suing on the contract. This ruling was approved by the general term. It was declared erroneous, however, by the Court of Appeals, which explained the theory of the complaint and set forth the plaintiff's right thereunder as follows:^{30a} "There was here, on the theory of the complaint, something more than a mere breach of contract. That breach was not the tort; it was only one of the elements which constituted it. Beyond that and outside of that there was said to have existed a fraudulent scheme and device by means of that breach to procure the foreclosure of the mortgage at a particular time and under such circumstances as would make that foreclosure ruinous to the plaintiff's rights, and remove him as an obstacle by causing him to lose his property, and thereby his means of resistance to the purpose ultimately sought. In other words, the necessary theory of the complaint is, that a breach of contract may be so intended and planned; so purposely fitted to time, and circumstances, and conditions; so inwoven into a scheme of oppression and fraud; so made to set in motion innocent causes which otherwise would not operate, as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious and wrongful act or omission. It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty.³¹ But such legal duty may arise, not merely out of certain relations of trust and confidence, inherent in the nature of the contract itself but may spring from extraneous circumstances, not constituting

^{30a}. The case was again tried, and 154 N. Y. 733, 49 N. E. 1103 when the plaintiff failed to establish the tort, set forth in his complaint, although "great indulgence was shown to him by the trial judge. He was permitted to reopen the case, and introduce further proof, but the effort in that direction failed, and the trial judge was left no discretion except to dismiss the complaint." This was affirmed. Rich v. N. Y. C. & H. R. Ry., 89 Hun, 604, 68 N. Y. State R. 879 (1895),

³¹. In Jones v. Stanly, 76 N. C. 355 (1877), a recovery was allowed against the defendant for \$3,000 damages, for maliciously inducing a railroad corporation, of which he was president, to break the contract to transport certain freight for plaintiff. For other authorities, of a similar character, See *infra*, chap. III, § 7.

elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud. The duty and the tort grow out of the entire range of facts of which the breach of contract was but one."

24. Extending the Area of Tort. The case, which we have stated thus at length, marks an important advance in the progress of the law of torts.³² Had it come before a common law tribunal, a century ago, there is little doubt that the ruling of the trial court would have been affirmed. Certainly the decision of the Court of Appeals would have amazed the anonymous author of "The Law of Actions on the Case for Torts and Wrongs."³³ The lack of precedent coupled with plaintiff's acknowledged right of action for breach of contract would have been powerful arguments against the plaintiff.³⁴ At present, neither lack of precedent nor the fact that plaintiff may bring a contract action is considered a serious obstacle to the maintenance of an action in tort.

For example, plaintiff was induced to marry a woman by defendant's representations that she was virtuous and respectable. In fact she was pregnant at the time by defendant, and, within a few months after the marriage, gave birth to a child of which defendant was the father. Plaintiff sued defendant for damages, and was met with the defense, among others, that no precedent could be cited for the action. This was admitted, but the New York Court of Appeals declared, "If the most that can be said is that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such fact is not enough to call

³². *Oliver v. Perkins*, 92 Mich. 304, 52 N. W. 609 (1892), accord. The court will not be induced to establish a new form of action, without manifest necessity, and none such appears in this case."

³³. Referred to *supra*, p. 1, as published A. D. 1720. In *Murray v. South Car. Ry.*, McMullan

³⁴. Cf. *Sheehorn v. Darwin*, 1 Treadway (S. C.) 196 (1812), in which the judge said, "I have never read or heard of such an action; though such occurrences must frequently take place, nor does it bear any analogy to cases quoted. * * * want of precedent."

for a reversal of the judgment." The court then proceeded to sustain plaintiff's recovery on the ground that his right as husband to the conjugal fellowship and society of a virtuous wife had been wrongfully invaded by defendant; that such conduct by defendant was a fraud upon plaintiff resulting in damage to him.³⁵

25. **The Right of Privacy.** That such a right exists is a modern claim. The first systematic attempt to formulate the claim and to define the right was made in 1890.^{35a} The right has been denied in several jurisdictions,^{35b} while it has been recognized and enforced in others.^{35c} In its broadest terms it is the right of each person, so long as he remains a private and law-abiding citizen, to be let alone. Undoubtedly, it includes the right on the part of the author of private letters to restrain the receiver from publishing them.^{35d} It is invaded, also, by falsely attributing to one the authorship of an article purporting to be autobiographical,^{35e} as well as by "rough shadowing" by detectives.^{35f}

35. *Kujek v. Goldman*, 150 N. Y. Supp. 30 (1901); *Henry v. Cherry*, 178, 44 N. E. 773, 34 L. R. A. 157, 55 30 R. I. 13, 73 At. 97, 24 L. R. A. N. Am. St. R. 670 (1896). The reasoning of this case is adopted and followed in *Graham v. Wallace*, 63 N. Y. Supp. (97 N. Y. St. Rep.) 372 (1900), where a female ward, on attaining her majority, was allowed to maintain an action in her own behalf against her personal guardian for damages for her seduction by him, when she was under the statutory age of consent, although the court found "the action without precedent." p. 373.

35c. *Pavesich v. New Eng. L. Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. R. 104 (1905); *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 At. 97 (1907); *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364, 34 L. R. A., N. S. 1137 (1909); *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076 (1911). See *Douglass v. Stokes* 149 Ky. 506, 149 S. W. 849 (1912), prohibiting photographer from publishing pictures of plaintiff's deformed children.

35a. *The Right of Privacy*, by Samuel D. Warren and Louis D. Brandeis, 4 Harv. L. R. 193. See *The Law of Privacy*, by Wilbur Larremore, 12 Col. L. R. 693 (1912).

35b. *Atkinson v. Doherty*, 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. R. 507 (1899); *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. R. 828 (1902), 64 App. Div. 30, 70 N. Y.

35d. *Baker v. Libbie*, 210 Mass. 599, 97 N. E. 109, 37 L. R. A., N. S. 944 (1912).

35e. *D'Almonte v. N. Y. Herald*, 154 App. Div. 453, 139 N. Y. Supp. 200 (1913).

35f. *Schultz v. Frankfort M. A.*

The denial of the right in New York was followed by the enactment of a statute, which recognizes and protects it to some extent, and which has been declared constitutional.^{35g}

26. Plaintiff Must Show Breach of Legal Duty. While courts are not dismayed by a want of precedent from sustaining novel tort actions, they do insist that the plaintiff's statement of his cause of action shall disclose a legal right on his part which has been wrongfully invaded by the defendant. Or, to put it in another way, they insist upon the plaintiff's showing that defendant's alleged misfeasance or nonfeasance was a breach of legal duty which he owed to plaintiff^{35h} Accordingly, a servant cannot maintain a tort action against his master for refusing to continue him in his employ, after the expiration of their contract, nor for refusing to give him a certificate of character.³⁶ In another case, plaintiff gave to an officer a valid process to serve on an actor. The officer entered defendant's theatre for the purpose of serving the process, but defendant forbade his going to the stage to make personal service, and he returned the process unserved. It was held³⁷ that as the officer had the legal right to break the door to the stage as well as to command sufficient force to enter, the cause of the plaintiff's injury, if any, was not defendant's refusal, but the officer's failure to do his duty.

Still again, it is not the legal duty of a steam surface railroad

Co., — Wis. — 139 N. W. 386 Nor does the law impose upon an (1913), 13 Col. Law Rev. 336. employer the duty of protecting his

35g. Sperry & Hutchinson Co. v. employee from the violence of a Rhodes, 193 N. Y. 223, 85 N. E. 1097, mob of strikers. Lewis v. Taylor 34 L. R. A., N. S. 1143, 127 Am. St. Coal Co., 112 Ky. 845, 66 S. W. 1044 R. 945, aff'd 220 U. S. 502, 31 Sup. (1902).

Ct. 490 (1911), applying ch. 132 L. **37.** Paulton v. Keith, 23 R. I. 164, 1903, now Civil Rights Law, Art. V. 49 At. 635 (1901), cf. Clark v. Gay,

35h. Rader v. Davis, — Ia. — 112 Ga. 777, 38 S. E. 81 (1901), 134 N. W. 849 (1912), defendant excluded plaintiff from defendant's a house, which he declared had be- premises at funeral of plaintiff's come worthless to him, because de- child: not a tort. fendant had murdered one of plain-

36. Cleveland & C. Ry. v. Jenkins, tiff's servants in it; and the com- 174 Ill. 398, 51 N. E. 811 (1898); plaint was held not to state a cause New York & C. Ry. v. Schaffer, 65 of action.

Ohio St. 414, 62 N. E. 1036 (1902).

company to expressly notify passengers that a train has stopped. If notice is given that a train is approaching a station, which is its "last stop," and where all passengers are to alight, anyone leaving the train before it stops acts at his peril. It is the duty of the company not to mislead the passenger, by announcing that it is safe for him to alight when in fact it is unsafe;³⁸ but it is the passenger's duty to discover whether the train has come to a stop or not. If the train has stopped short of the station, at a point when it is dangerous for passengers to alight, the company may be under a duty to notify them of these facts.^{38a}

27. False Statements Causing Damage. Not every false statement, made by one person which causes injury to another, constitutes an actionable tort. If it did, "a man might sue his neighbor for any mode of communicating erroneous information, such for example, as having a conspicuous clock too slow, since plaintiff might be thereby prevented from attending to some duty or acquiring some benefit." A class of false representations which have been held to have no legal effect, are those by which one excites "another to believe that he intends to make him his heir and then leaves his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences, unless the person making the representation not only excites an expectation that it will be fulfilled, but legally binds himself to fulfill it."³⁹ Much less will

³⁸. *Mearns v. The Central Ry. of D.* 293, 296 (1880), cf. *Hutchins v. N. J.*, 163 N. Y. 108, 57 N. E. 292 *Hutchins*, 7 Hill (N. Y.) 104 (1845). (1900), cf. *Bridges v. North London Ry. Co.*, L. R., 7 H. L. 213 (1874); *Filler v. N. Y. Cent. Ry.*, 49 N. Y. 47 (1872); *Robson v. North Eastern Ry. Co.*, 2 Q. B. D. 85 (1876). Here the defendants, by false representations concerning the plaintiff, induced a third party to revoke his will, devising valuable property to plaintiff, and to execute another, depriving him of all the benefits

^{38a}. *Bartle v. N. Y. C. Ry.*, 193 N. Y. 362, 85 N. E. 109 (1908), holding that it was for the jury to say whether the defendant was negligent in its conduct towards the passenger. which would have accrued under the first will. Yet it was held that the plaintiff had sustained no legal harm—he had no legal interest in the property mentioned in the first will—nothing but a mere naked possibility "which is altogether too

³⁹. *Alderson v. Maddison*, 5 Exch.

blundering but honest advice, given gratuitously to one who is erecting a structure, create a legal liability against the adviser who acts as a mere volunteer.⁴⁰ Breach of moral duty may not be a tort. It is a breach of legal duty only which gives rise to a tort action.^{40a} And this is much narrower than moral duty. "If I know that a villain intends to defraud or in any way injure my neighbor, it is doubtless my duty, as a good citizen, and as a Christian man, to put him on his guard. But there is no rule of law which renders me liable for his loss in case of my neglect of duty. It is a moral duty simply; not one recognized and enforced by law."⁴¹

28. Waiving Tort and Suing in Contract. In certain cases the victim of a tort may sue the wrongdoer in a contract action, although no contract exists between them. For example X takes Y's horse and sells it without the latter's consent. Y has his option to sue X in tort for the conversion of the animal, or to waive the tort and sue in contract for the proceeds of the sale.⁴² The latter form of action was devised for "the undisguised purpose of giving a better and more convenient remedy"⁴³ to the injured person than his tort action. If X died after converting the horse and before suit was brought by Y, the latter would be met in a tort action with the defense that the wrong done by X had died with him.⁴⁴ Y was therefore allowed to sue the personal representative of X in a contract action for the value of the horse, upon the fiction of an implied promise by X to pay the amount, as

shadowy and evanescent to be dealt with by courts of law." Also, *Greene (La.)*, 161, 169 (1851). *Ac-*
cord, Collins v. Evans, 5 Ad. & E.,
Dudley v. Briggs, 141 Mass. 582 N. S. 820 (1844).

(1886), defendant falsely represented that plaintiff would not publish a directory of Bristol County
40a. *Borley v. Walford*, 9 Ad. & E., N. S. 197 (1846).

in 1885, and thus induced third persons to advertise in and subscribe
41. *Ohio & C. Ry. Co. v. Kasson*, 37 N. Y. 218, 224 (1867).

for defendant's directory. As a result plaintiff gave up the publication of the directory: held plaintiff's
42. *Howe v. Clancey*, 53 Me. 130 (1865).

intention to publish a directory was not property, and no legal right of
43. *Pollock on Torts* (8th Ed.), 554.

his was invaded by defendant.
44. This defense was based on the common law maxim: *Actio personalis moritur cum persona*.

40. *McCausland v. Cresap*, 3

money had and received by him to Y's use. Speaking of this form of action, Lord Mansfield laid down the rule in a leading case ⁴⁵ as follows: "If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt and gives this action, founded in the equity of the plaintiff's case as it were upon a contract, *quasi ex contractu*, as the Roman law expresses it."

Some of the reasons for encouraging this form of action are stated by Lord Mansfield as follows: ⁴⁶ "One great benefit which arises to suitors from the nature of this action is that the plaintiff need not state the special circumstances from which he concludes that, *ex aequo et bono*, the money received by the defendant, ought to be deemed as belonging to him; that he may declare generally that the money was received to his use; and make out his case at the trial. This is equally beneficial to the defendant. It is the most favorable way in which he can be sued; he can be liable no further than the money he has received; and against that may go into every equitable defense upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by everything which shows that the plaintiff *ex aequo et bono*, is not entitled to the whole of his demand or to any part of it."

The victim of a tort, however, is not bound to waive his action *ex delicto* for one *ex contractu*.^{46a}

29. Distinction between Quasi-Contract and True Contract. The cases in which an injured party has an option to sue in tort or in *quasi*-contract, are to be distinguished from those where his

⁴⁵ *Moses v. Macferlan*, 2 Burr. 1005, 1008 (1760). The plaintiff in this case had been compelled, by defendant's fraudulent use of promissory notes made by plaintiff, to pay a certain sum of money to defendant, and the court held that he was entitled to maintain this action for the recovery of the money so paid. *ing than an action by the town against the owner of a dog, to recover damages paid by the town to the owners of sheep for injuries done them by the dog, is an action in tort, and not in contract, following East Kingston v. Towle*, 48 N. H. 57, 63, 97 Am. Dec. 575, 2 Am. R. 174 (1868); *In re Cumberland Tel. & Tel. Co.*, 116 La. 125, 40 So. 590 (1906).

⁴⁶ *Ibid.* 1010.

^{46a} *Town of Richmond v. James*, 27 R. I. 154, 61 At. 54 (1905), hold-

option is between a tort action and one for the breach of a true contract.⁴⁷ Failure to observe this distinction has led some eminent judges to unsound conclusions. For example, it has been held that if an owner of goods, wrongfully converted by several persons, sues one of them in quasi-contract for their value, he thereby makes a final election to treat the transaction as a sale of the goods to such defendant, and cannot subsequently sue the others for "conversion."⁴⁸ In such a case the conversion ought not to be deemed any the less a tort, because a legal fiction permits the owner to sue in assumpsit. There was in fact no sale to the defendant. Indeed, the plaintiff in his quasi-contract action alleges and proves conversion, by the defendant. The tort is the very foundation of the action, and what the plaintiff waives, when suing in assumpsit, is more properly described as damages for the conversion, than the tort itself. His election is simply between remedies against this defendant for an act done, and should leave his rights against the other wrongdoers unimpaired, until he has obtained legal satisfaction for the wrong.⁴⁹

It will be noticed that Lord Mansfield limited the right to waive tort and sue in contract to cases where the defendant is bound by "the ties of natural justice to refund" to the plaintiff. He does not intimate that the obligation of a tortfeasor to compensate his victim for injuries inflicted, can be treated as implying a promise to pay damages, and thus be made the basis of a contract action. Nor has a plaintiff ever succeeded in waiving a pure tort, which did not in any way unjustly enrich the defendant, and in main-

47. *Supra*, ¶ 20, and *Boorman v. takes the goods of another, there is Brown*, 3 Q. B. (Ad. & E., N. S.), 511 no sale between the parties; and (1842), there cited. Cf. *Ballew v. yet the highest court of New York Andrus' Ex'r*, 10 La. 216 (1836). gravely asserts that there was. In

48. *Terry v. Munger*, 121 N. Y. other words, a fiction to which it 161; 24 N. E. 272 (1890); *Carroll v. was no longer necessary to resort in Fethers*, 102 Wis. 436, 78 N. W. 604 New York, in order to give a remedy, is there resorted to, to deny (1889).

49. *Huffman v. Hughlett*, 11 Lea a right; and the court says there (Tenn.), 549 (1883). Keener, *Quasi is no tort where but for the proof Contracts*, Chapter 3. The learned of a tort there could have been no author in criticising *Terry v. Munger*, *supra*, says, "Now, every one recovery against anyone. The decision will probably never be cited knows that when one man tortiously as illustrating the maxim, *In fic-*

taining a contract action for the damages.⁵⁰ In the Louisiana and Missouri cases, cited in the last note, the plaintiff had been induced by the false representations of defendant's intestate, that he was unmarried, to marry him and live with him as his wife. Discovering the deceit after the wrongdoer's death, the plaintiff was held entitled to maintain an action against his estate for the value of the services rendered him, to the extent that she could show that "he was made richer, or his circumstances improved" thereby.⁵¹

30. Quasi-Delict. The law of Scotland, founded as it is upon the civil law, recognizes not only quasi-contracts, but also quasi-delicts. "Delicts proper," said Lord Watson, in deciding a Scotch case at the bar of the House of Lords, "embraces all breaches of the law which expose their perpetrator to criminal punishment. The term quasi-delict is generally applied to any violation of the common or statute law, which does not infer criminal consequences, and does not consist in the breach of any contract express or implied. Cases may and do often occur in which it is exceedingly

tione juris subsistit equitas," at p. 212. Harlan, is unexceptionable when applied to such a case as he was

50. *Bigby v. United States*, 188 U. S. 400, 23 Sup. Ct. 468 (1902). At p. 409, Harlan, J., says: "The plaintiff cannot by the device of waiving the tort committed by the elevator operator make a case against the Government of implied contract. A party may in some cases waive a tort * * * but it has been well said that a right of action in contract cannot be created by waiving a tort; and the duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained," citing *Cooper v. Cooper*, 147 Mass. 370 373 (1888). The decision in the latter case is ably criticized in Keener's *Quasi Contracts*, pp. 321-325; and is contra to *Fox v. Dawson*, 8 Martin, 94 (4 La. 47) (1820), and *Higgins v. Breen*, 9 Mo. 493 (1845); but the language, quoted by Mr. Justice

considering. See the facts stated supra, § 19.

51. In some states, legislation has authorized persons injured by the fraud or deceit of another to sue in assumpsit, for the damages caused by the injury, and expressly declares "that a promise to pay such damages shall be implied by law." See Mich. Compiled Laws, § 10421, applied in *In re Pennewill*, 119 Fed. 139 (1902); *Hallett v. Gordon*, 128 Mich. 364, 87 N. W. 261 (1901), "while it is anomalous to say that one who perpetrates a fraud or practices deceit, by implication promises to pay any damages that may result therefrom, we are not prepared to say the Legislature may not provide that for damages growing out of fraud and deceit, assumpsit may be maintained."

difficult to draw the line between delicts and quasi-delicts. The latter class, as it has been developed in the course of the present century, covers a great variety of acts and omissions, ranging from deliberate breaches of the law, closely bordering upon crime, to breaches comparatively venial and involving no moral delinquency.”⁵²

In Louisiana, whose legal rules are also founded on those of the civil law, quasi-offense is used in much the same sense as quasi-delict in Scotland. “Offenses,” said the Supreme Court of the State, “are those illegal acts which are done wickedly and with the intent to injure, while quasi-offenses are those which cause injury to another, but which proceed only from error, neglect or imprudence.”⁵³

31. Quasi-Tort. The term quasi-tort appears to be finding its way into our legal nomenclature, but not at all as a synonym of quasi-delict or quasi-offense. In a recent English text-book⁵⁴ it is said: “Suppose a solicitor be employed to transact certain business, and he does not transact it, or does it negligently. In that case the action against him might be either an action *ex contractu*, for breach of contract, or an action *ex delicto*, for breach of duty in not transacting, or in transacting negligently, the business which he had undertaken. Cases of this kind are classified by some writers as quasi torts.” In this sense the term has been used by Lord Justice Lindley, in a case where he was called upon to decide whether the action was founded upon contract or tort.⁵⁵ This usage, however, has not commended itself to the judiciary either in England or in the United States.

52. *Palmer v. Wick, etc., Company* Salmond's Law of Torts (2d ed.), pp. (1894), A. C. 318, 326, 6 Rep. 245, 5 and 6, the term is used in the 71 L. T. 168. In this case the quasi sense of “fictitious torts,” to characterize such cases as those for delict consisted in negligently supplying and using a defective tackle-block. breach of warranty, which are “pure breaches of contract,” but which,

53. *Edwards v. Turner*, 6 Rob. under the “perversities of the old (La.) 382 (1844). The quasi-offense pleading and practice,” could be in this case was the wrongful seizure, under a writ of attachment brought in tort. This author notes against a third party of plaintiff's the term only to discard it. steamboat.

54. Ringwood, *Outlines of the Law* **55** *Taylor v. Manchester & C. Ry.*, 11 Times Law Rep. 27 (1894), 43 W. of Torts, p. 6 (London, 1898). In R. 120, 71 L. T. 596, 64 L. J. Q. B. 6 (1895), 1 Q. B. 134.

CHAPTER III.

HARMS THAT ARE NOT TORTS.

§ 1. HARM MUST BE UNLAWFUL.

32. If the gist of tort consists in the unlawful invasion of a legal right,¹ we shall not be surprised to find that one person may inflict harm upon another, without committing a tort. The famous maxim of the Roman law—*sic utere tuo ut alienum non laedas*—is not a prohibition of every sort of harm, but only of unlawful harm.² A learned English judge once characterized the maxim as “mere verbiage,” adding: “A party may damage the property of another when the law permits; and he may not when the law prohibits; so that the maxim can never be applied till the law is ascertained; and when it is, the maxim is superfluous.”³ Whether this irreverent fling at a time-honored maxim was justified or not, the learned judge was quite right in asserting that a party may damage another in person or property without liability to a tort action, provided the law permits it. Let us consider, briefly, some of the typical classes of harm that are not torts.

33. **Arrest of Innocent Person.** We shall see in a later chapter, that our law guards with special jealousy the right of personal liberty; yet frequently it permits an innocent person to be arrested and imprisoned, and denies him any redress for the harm thus inflicted. For example, a murder has been committed, and X has reasonable cause to believe that Y is the murderer; the common law permits X to arrest Y and hale him before a magistrate, in the character of imprisoned murderer. Even though Y is absolutely innocent, and though such arrest and charge may cause Y a heavy money loss as well as injure his standing in the community, X has not committed a tort against him.⁴ He must bear the loss, as one

1. Supra, chap. 11, § 1.

2. Ante, ¶ 5.

3. *Bonomi v. Backhouse*, E. B. & E. 622 (1858); *Earle, J.*, at p. 643.

4. *Beckwith v. Philby*, 6 B. & C. 626 (1827). The common-law rule tempted in his presence; or when

stated in the text has been modified in some of our states by statute.

For example in New York, a private person may arrest another only

“for a crime committed or at-

of the incidents of life in organized society. His right to personal liberty is temporarily sacrificed to the higher right of the public security.

§ 2. DEFAMATION BY LEGISLATORS.

34. Members of Parliament in England, and members of Congress and State Legislatures in this country, are not to be questioned in any other place, for any speech or debate.⁵ While this exemption from liability for the defamation of another is guaranteed to legislators by constitutional provisions in express terms, it rests upon well-established principles of the common law. It is not accorded to legislators for their individual benefit, "but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecution, civil or criminal."⁶ The privilege may be abused, and a private citizen may have his reputation basely defamed without any pecuniary recompense or legal redress. It is true, the house of which the defaming speaker is a member may force him to retract the slanderous statement on pain of expulsion. But even if it takes no such action, and leaves the private citizen to bear without mitigation the stigma cast upon him, and to sustain any special damage caused to him, it is but one of many cases where "a private benefit must submit to the public good. The injury to the reputation of a private citizen is of less importance to the commonwealth, than the free and unreserved exercise of the duties of a representative, unawed by the fear of legal prosecution."^{6a}

the person arrested has committed a felony, although not in his presence." Code of Crim. Proc., § 183; *Gold v. Armed*, 140 App. Div. 73, 124 N. Y. Supp. 1069 (1910).

5. Bill of Rights, 1 W. & M. Sess. 2, c. 2; U. S. Const., Art. 1, § 6; see *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377, 2 Trans. R. 56, 23 A. L. J. 227 (1881).

similar clauses in various State constitutions. 6a. Absolute Immunity in Defamation. By Van Vechten Veeder, 10

6. *Coffin v. Coffin*, 4 Mass. 1, 28, 3 Am. Dec. 189 (1808). In this case defendant charged plaintiff with having robbed a bank. As this charge was not made while acting as a member of the Massachusetts legislature, it was held that defendant was not within the exemption. *Wason* (1869), L. R. 4 Q. B. 573, 38 L. J. Q. B. 302; *Dillon v. Balfour* (1887), 20 L. R. Ir. 600.

§ 3. JUDICIAL OFFICERS' EXEMPTION.

35. Similar considerations of public policy operate to exempt judicial officers from tort liability to persons, harmed by their mistakes, and even by their corrupt misconduct⁷ in the performance of their judicial function. "Such an exemption is absolutely essential to the very existence, in any valuable form, of the judicial office itself; for a judge could not be either respected or independent, if his motives or conclusions could be put in question at the instance of every disappointed suitor."⁸

~~In order to entitle a judicial officer to this exemption, however, it must appear that his mistake or misconduct occurred during a judicial proceeding and was a part of it.~~ If a magistrate should of his own motion, without oath or complaint being made to him, and without color of legal authority, issue a warrant and cause the arrest of an innocent person, the one so illegally imprisoned could maintain a tort action against him.⁹ The act would not be a judi-

7. *Anderson v. Gorrie* (1895), 1 Q. B. 668, 71 L. T. 382: "By the common law of England no action will lie against a judge for acts done in the exercise of his judicial office." *Dixon v. Cooper*, 109 Ky. 29, 58 S. W. 437 (1900).

8. *Grove v. Van Duyn*, 44 N. J. L. 654, 42 Am. R. 648 (1900). In *Yates v. Lansing*, 5 Johns. (N. Y.) 282, 291 (1810), Kent, Ch. J., said: "The doctrine which holds a judge exempt from civil suit or indictment, for any act done or omitted to be done by him, sitting as judge, has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained, by an undisturbed current of decision, in the English courts, amid every change of policy, and through every revolution of government." This view was approved by the Court of Errors, in the same case on appeal, 9 Johns. 395 (1811),

and the following American decisions in accord were cited: *Lining v. Bentham*, 2 Bay (S. C.) (1796); *Brodie v. Rutledge*, 2 Bay (S. C.) 69 (1796); *Phelps v. Sill*, 1 Day (Conn.) 315 (1804). In a few states there is a disposition to limit judicial immunity to mistakes made in good faith. See *Gregory v. Brown*, 4 Bibb (Ky.) 28 (1815); *Morgan v. Dudley*, 18 B. Mon. 711 (1857); *Hoggett v. Bigley*, 6 Humph. (Tenn.) 236 (1845); *Cope v. Ramsey*, 2 Heisk. (Tenn.) 197 (1870). The last two cases have recently been limited to justices of the peace, and applied to them because they are not subject to impeachment in Tennessee: *Webb v. Fisher*, 109 Tenn. 101; 72 S. W. 110, 60 L. R. A. 791 (1903).

9. *Glazar v. Hubbard*, 102 Ky. 68, 42 S. W. 1114 (1897); *State v. McDaniel*, 78 Miss. 1, 27 So. 994 (1900).

cial act. It is the individual and not the magistrate who acts in such a case. "When there is no jurisdiction at all, there is no judge; the proceeding is as nothing" ¹⁰ has long been the accepted rule.

36. Lange v. Benedict. A modern case declares: "It is plain that the fact that a man sits in the seat of justice, though having a clear right to sit there, will not protect him in every act which he may choose or chance to do there: Should such an one, rightfully holding a court for the trial of a civil action, order the head of a bystander to be stricken off, and be obeyed, he would be liable." ¹¹ But, in actual practice, the question is not often as simple as in the supposititious case, just put. While it is generally agreed that the test of a judicial officer's liability to civil suit is, whether the act complained of was a matter within his jurisdiction as judge, the courts have had no little difficulty in applying the test.¹² However, the view which prevails generally has been set forth in a well considered opinion of the New York Court of Appeals as follows: In order to exempt a judge from tort liability for misconduct, it must appear that when he acted, "he had judicial jurisdiction of the person acted upon, and of the subject matter as to which it was done. Jurisdiction of the person is when the individual acted upon is before the judge, either constructively or in fact, by reason of the service upon him of some process known to the law, and which has been duly issued and executed." Jurisdiction of the subject matter is the power to inquire and adjudge, whether the facts of a

¹⁰ Perkins v. Proctor, 2 Wils. 382, that the person become guardian *ad litem* for an infant son.

Pearne, 75 Conn. 350, 53 Atl. 955 (1903); McCarg v. Burr, 186 N. Y. (Mass.) 120 (1854); Pratt v. Gardner, 79 N. E. 715 (1906); Heller v. Holden v. Smith, 14 Q. B. (A. & E. N. S.) 841 (1850); Patzack v. Von Gerichten, 10 Mo. App. 424 (1891); Vaughan v. Congdon, 56 Vt. 111, 48 Am. R. 758, 30 A. L. J. 289 (1883) — see dissenting opinion in this case; Austin v. Vrooman, 128 N. Y. 229, 28 N. E. 477, 44 A. L. J. 424, 14 L. R. A. 138, and note (1891).

¹¹ Lange v. Benedict, 73 N. Y. 12, 29 Am. R. 80, 18 A. L. J. 11 (1878); citing Beaurain v. Sir William Scott, 3 Camp. 338 (1813), where a judge of the ecclesiastical court in England excommunicated one for refusing to obey an order made by him,

particular case make that case a proper one for judicial consideration by the judge before whom it is brought.¹³

Applying that view to the case then before the court, it was held that the defendant was exempt from liability to the plaintiff in tort, although the Supreme Court of the United States had ruled, that defendant had imposed the sentence of imprisonment for one year upon plaintiff without authority; and had discharged plaintiff from such erroneous imprisonment. As Judge Benedict imposed the sentence while holding a term of the United States Circuit Court; as plaintiff was before the court under a valid process, and as the question, whether any sentence could be pronounced against him by that court, at that time, was one that he was then and there bound by his judicial duty to decide, his decision was a judicial act, and although erroneous and harmful to plaintiff was not an actionable tort.^{13a}

37. *Grove v. Van Duyn*. The same doctrine was applied by the Court of Errors & Appeals of New Jersey, in a carefully reasoned case already cited.¹⁴ Plaintiff was arrested under a warrant issued by defendant Stout, as justice of the peace, and was committed to jail by the justice on a sworn complaint charging him with forcibly and unlawfully carrying off a quantity of corn stalks from certain lands. The complaint was made under a statute which declared it to be an indictable offense to willfully, unlawfully and maliciously carry off any barrack, cock, crib, rick or stacks of hay, corn, wheat, barley, oats or grain of any kind, but which said nothing of cornstalks. Later, plaintiff was discharged from the imprisonment, and sued the justice for assault and unlawful imprisonment. He was nonsuited, and this judgment was affirmed, although the court of errors declared that the misconduct described in the complaint before the justice was not the misconduct described in the statute. The justice, it was held, was

13. *Lange v. Benedict*, 73 N. Y. 12, judge enjoys immunity from action 29 Am. R. 80, 18 A. L. J. 11 (1878). only so long as he does not exceed The decision is criticised in a his jurisdiction.

learned article on the "Liability of 13a. Followed in *Sweeney v. officers acting in a judicial capacity*," O'Dwyer, 197 N. Y. 499, 90 N. E. 1129 by Arthur Biddle, Esq., 15 Am. L. (1910).

Rev. 427 (1881). Mr. Biddle con- 14. *Grove v. Van Duyn*, 44 N. J. L. tends that the true rule is that a 654; 42 Am. R. 648 (1882).

called upon by the facts laid before him, to decide whether his authority extended over the act complained of, and over the person who was charged with doing that act. In making that decision, he was doing a judicial act, and therefore, was not liable in a suit to any person affected by his decision, whether such decision was right or wrong.

38. Judges of Inferior Courts. The case, it will be observed, gives no countenance to the distinction recognized by some authorities, between the liability of judges of courts of general jurisdiction and those of inferior courts.¹⁵ On grounds of public policy, both classes are entitled to equal protection, and the most recent and best considered cases in this country, as well as in England, accord that protection.¹⁶ If either class is in greater need of this protection than the other, it is the judges of inferior courts such as justices of the peace. As pointed out by a distinguished judge: "They stand nearer to the people than the judges of the superior courts, and are more liable to be influenced by popular feeling; and it is therefore even more important that the rule should be enforced, so that they may be accorded that immunity from suit which will lead to independence of action. Nor is there any danger that this immunity from suits for damages will leave the judges superior to the law, or as feeling that they are above the law."¹⁷ For malicious or corrupt misconduct they are liable to removal from office and to criminal prosecution. Even though individuals may be forced to suffer harm at the hands of a corrupt judge, without obtaining

^{15.} *De Courcey v. Cox*, 94 Cal. 665, justice of the peace); *Haggard v. 30 Pac. 95* (1892); *Truesdell v. Pelicier Freres* (1892), A. C. 61 (defendant was a judge of a consular court); *Garnett v. Ferrand*, 6 B. & C. 619 (1827) (defendant was a coroner); *State v. Wolever*, 127 Ind. 306, 26 N. E. 762 (1890) (defendant was a mayor); *Bannister v. Wakeman*, 64 Vt. 203 (1891) (defendant was a justice of the peace); *Rudd v. Darling*, 64 Vt. 456, 25 At. 479 (1892) (defendant was judge of city court).
^{17.} *Brewer, J., in Cooke v. Bangs*, 31 Fed. 640, 642 (1887).

^{16.} *Allec v. Reece*, 39 Fed. 341, 40 A. L. J. 226 (1889) (defendant was a

pecuniary compensation from him, his immunity, as already pointed out, does not proceed from a rule of law established for his benefit, but "for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences."¹⁸

39. Arbitrators: Military and Naval Courts. The same principle operates to exempt an arbitrator from liability to answer in damages for an erroneous award, even though it be also malicious and corrupt.¹⁹ In England it is settled that members of military or naval courts are entitled to the same exemption that is accorded to judges of civil tribunals.²⁰ Indeed the rule we have been considering should be applied, whenever the officer in question is acting in a judicial capacity, under legal authority to hear and determine matters of dispute between individuals; and the cases cited in the last paragraph support this view.

40. Quasi-Judicial Officers. When persons are legally empowered to deal with and determine questions, which call for the exercise of deliberation, judgment, and discretion, but which do not involve the administration of justice between individuals,²¹ they are said to occupy a quasi-judicial position. Municipal officers belong to this class, when engaged in determining whether a sewer is necessary in a particular locality,²² or who is the "lowest responsible bidder giving adequate security."²³ So do assessors, in determining whether a particular person is entitled to exemption from assessment, as a minister of the gospel, or in estimating the value of taxable property.²⁴ School trustees and members of boards of

18. *Scott v. Stansfield*, L. R. 3 Ex. (1875); *Dawkins v. Prince Edward* 220, 37 L. J. Ex. 155 (1865) (defendant was a county judge); *Burr v.* 567.

Smith (1909), 2 K. B. 306, 312, 78 L. J. K. B. 889 (defendant was official receiver in companies' liquidation).

19. *Jones v. Brown*, 54 Ia. 74 (1880). Such misconduct, however,

may defeat an action by him for fees as arbitrator. *Bever v. Brown*, 56 Ia. 565 (1881).

20. See *Dawkins v. Lord Rokeby*, (N. Y.) 117 (1846); *Stearns v. Miller*, L. R. 7, H. L. 744, 45 L. J. Q. B. 81er, 25 Vt. 20 (1852).

21. *Mills v. City of Rochester*, 32 N. Y. 489, 495 (1865).

22. *Johnson v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. 923 (1885).

23. *East River Gas Light Co. v. Donnelly*, 93 N. Y. 557 (1883).

24. *Weaver v. Devendorf*, 3 Den.

education often act in a quasi-judicial capacity in deciding what children are entitled to attend school.²⁵ The Postmaster-General of the United States, although ordinarily an executive officer, performs quasi-judicial functions, in settling the accounts of contractors with his department.²⁶ County boards of supervisors are legislative bodies, but in examining and approving the sureties on official bonds, they act in a quasi-judicial capacity.²⁷

In all such cases, the quasi-judicial officer is exempt from liability for the consequences of honest mistakes and errors of judgment, however harmful these may be to innocent persons. According to the weight of authority, his immunity does not extend beyond this,²⁸ although in some jurisdictions the full immunity of judicial officers has been accorded to him.²⁹ In a leading case of the latter class it is said: "He is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed. If corrupt he may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may have been done."³⁰ The reason for the prevailing view has been stated by a learned author³¹ as follows: "By the express or implied terms of the officer's authority, he is to act honestly, carefully, and after the dictates of his own judgment, which, of necessity, being a human judgment, may err: therefore, when he has done what is thus commanded, whether the result is correct or not, he has exactly discharged his duty, and the law, which compelled this of him, will protect him, whatever harm may have befallen individuals. * * * It follows that if

25. *Stewart v. Southard*, 17 Ohio, 402 (1848). *River Gas-Light Co. v. Donnelly*, 93 N. Y. 557 (1887); *Seifert v. City of*

26. *Kendall v. Stokes*, 3 How. (U. S.) 87, 98 (1845). *Brooklyn*, 101 N. Y. 136, 4 N. E. 321 (1896).

27. *Wasson v. Mitchell*, 18 Ia. 153 (1864).

28. Cases in the last three notes; also, *Pikes v. Megoun*, 44 Mo. 491 (1869); *Gregory v. Brooks*, 37 Conn. 365 (1870); *Black v. Linn*, 17 S. D. 335, 96 N. W. 697 (1903). Cf. *Dillingham v. Snow*, 5 Mass. 547 (1809), where quasi-judicial officers are likened to judges of inferior courts, but their liability for malicious acts is left undecided.

29. *Weaver v. Devendorf*, 3 Den. (N. Y.) 117 (1846); *Mills v. City of Brooklyn*, 32 N. Y. 489 (1851); *East*

30. *Wilson v. Mayor, etc., of New York*, 1 Den. (N. Y.) 595 (1845).

31. *Bishop, Non-contract Law*, § 787.

the quasi-judicial act is corrupt, or even if it is negligent, it will not be protected.”³²

A county board of Supervisors exercise a quasi-judicial function in auditing claims against the county.^{32a}

§ 4. HARMS INFLICTED BY ACTS OF STATE.

41. Another class of harms, which are not torts, are those inflicted by acts of State. They are not of frequent occurrence, being limited to injuries done to the subjects of one nation by the sovereign authority of another, or by the subjects of that other and rati-

32. In the famous case of *Bernardiston v. Soame* (2 Lev. 114, 6 Howell's State Trials, 1092-1120 (1674 and 1689)), the plaintiff charged the defendant, as sheriff, with maliciously making a false return of an election, which plaintiff claimed had resulted in his election to the House of Commons, while according to the sheriff's return he had been defeated. At the trial, Twysden, Rainsford, and Wylde, judges of the King's Bench, charged the jury that if they believed the return was made maliciously they should find for the plaintiff. A verdict was given in plaintiff's favor for £800. On motion in arrest of judgment, it was held by Hale, C. J., and Twysden and Wylde, JJ. (Rainsford, J., doubting) that “for as much as the return is said to be false and malicious and with intent to put the plaintiff to charge and expense to prove his election, and so found by the jury, the action lay and judgment was given for the plaintiff.” This decision was reversed by the Exchequer Chamber, and the reversal was affirmed by the House of Lords. The principal ground of reversal is stated by North, C. J., as follows: “The sheriff, as to the declaring the majority is judge; and no action will lie against a judge for what he does judicially, though it be laid *falso, malitiose et scienter*.” Lord North refers to the fact that the sheriff often acts ministerially, and declares that when acting in that capacity, a different rule of liability applies. When acting quasi-judicially, however, he asserts, the sheriff should have the same protection that is accorded to any judge in Westminster Hall. In New York, election officers possess only ministerial functions and are not quasi-judicial officers. *People ex rel. Stapleton v. Bell*, 119 N. Y. 175, 23 N. E. 533 (1890); *People ex rel. Sherwood v. Board of Canvassers*, 129 N. Y. 360, 29 N. E. 345 (1891). See opinion of Dwight, C., in *Goetcheus v. Matthewson*, 61 N. Y. 420 (1875); *Morris v. Colorado Mid. Ry.*, 48 Colo. 147, 109 Pac. 430 (1910).

32a. *Wallace v. Jones*, 195 N. Y. 511, 88 N. E. 1134 (1909); *aff'd* 122 App. Div. 497, 107 N. Y. Supp. 288 (1907).

fied by it. A typical example is supplied by *Buron v. Denman*.³³ The defendant, a captain in the British navy, caused certain barracons on the west coast of Africa to be burned and the slaves contained in them to be released. His conduct, although not authorized by previous orders, was approved and ratified by the British government. Thereafter, the owner of the slaves sued the captain for their loss, but it was held that the action would not lie because the captain's acts were acts of State. The principle underlying this and similar decisions has been stated in various forms. One statement is "that the acts of a sovereign State are final and can be called in question only by war or by an appeal to the justice of the State itself. They cannot be examined into by the courts of the State which does them."³⁴ Another form of statement is: "The transactions of independent States between each other are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make."³⁵ The principle has been stated in still another form as follows: "When an act, injurious to a foreigner, and which might otherwise afford a ground of action, is done by a British subject, and the act is

^{33.} 2 Exch. 167, 188-9 (1847). The same principle is applied in *Lamar v. Brown*, 92 U. S. 187 (1875), and *U. S. v. The Paquete Habana*, 189 U. S. 453, 465, 23 Sup. Ct. 593 (1902) and *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 29 Sup. Ct. 511 (1909), *aff'g* 160 Fed. 184 (1908). "Sovereignty means that the decree of the sovereign makes law; and foreign courts cannot condemn the influences persuading the sovereign to make the decree. Acts of soldiers and officials of a foreign government must be taken to have been done by its order."

^{34.} Stephen, *History of the Criminal Law of Eng.*, vol. 2, p. 64. Similar statements are found in various opinions of Justice Holmes. See *O'Reilly de Camera v. Brooke*, 209

U. S. 45, 52, 28 Sup. Ct. 274 (1908). "We think it plain that where, as here, the jurisdiction of the case depends upon the establishment of a 'tort only in violation of the law of nations, or of a treaty of the United States,' it is impossible for the courts to declare an act a tort of that kind when the executive, Congress and treaty-making power all have adopted the act. We see no reason to doubt that the ratification extended to the conduct of General Brooke."

^{35.} *Secretary of State in Council of India v. Kamachee Boye Sahaba*, 13 Mo. P. C. 22, 75 (1859). Accord, *Underhill v. Hernandez*, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456 (1897).

adopted by the British government, it becomes an act of the State, and the private right of action becomes merged in the international question which arises between the British government and that of the foreigner.”³⁶

42. Similiar considerations have led to the adoption of the rule that neither the sovereign prince of an independent power, nor its duly accredited representative, is liable in tort for harm inflicted upon individuals, while sojourning in a foreign country. Redress for such an injury must be sought not in the ordinary courts of justice, but through the channels of international diplomacy. The principle deducible from the cases on this topic has been judicially declared to be “that, as a consequence of the absolute independence of every sovereign authority, and of international comity, which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines

36. Cockburn, C. J., in *Feather v. The Queen*, 6 B. & S. 257, 296 (1865), cf. *People v. McLeod*, 25 Wend. 483; 1 Hill, 377 (1841), in which the Supreme Court of New York refused to adopt this view. Mr. Webster declared in the U. S. Senate, that the opinion in that case was “not a reputable opinion, either on account of the results reached, or the reasoning on which it proceeds.” In his letter of instruction to the Attorney-General concerning the McLeod case, Mr. Webster wrote: “If the attack on the *Caroline* was unjustifiable, as this Government has asserted, the law which has been violated is the law of Nations; and the redress which is to be sought is the redress authorized in such cases by the provisions of that code.” After remarking, that if McLeod had been arrested by a United States officer, he would have been discharged by the Federal Government, while had he been sued for damages in a civil action he must have availed him-

self of his defense in judicial proceedings, Mr. Webster added: “But whether the process be criminal or civil, the fact of having acted under public authority and in obedience to the order of lawful superiors, must be regarded as a valid defense; otherwise, individuals would be holden responsible for injuries resulting from the acts of government and even from the operations of war.” Curtis’ *Life of Webster*, pp. 66-69. At that time, the Federal Government was unable to take McLeod from the jurisdiction of the State Court, but serious international difficulty was avoided by the verdict of acquittal. By an act of Congress, passed Aug. 29, 1842 (now a part of § 753, U. S. R. S.), authority, in such a case was given to the Federal courts to remove the foreign subject from the jurisdiction and control of the State tribunals and officers. Applied in *Wildenhus’s Case*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565 (1887).

to exercise, by means of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador, of any other State, or over the public property of any ambassador, though such sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." ²⁷

43. Liability of Government Officials to Fellow Citizens. The immunities, which we have been considering, do not extend to government officials and agents, in their dealings with fellow citizens or subjects. It is true, the sovereign cannot be made a defendant in an action for a tort against a subject, nor in this country, can the government of the Union or of a State be proceeded against in such an action, unless it consents to be sued.²⁸ Even a petition of

27. The Parliament Belge, 5 Probate Div. 197, 214 (1880). Cited and followed in *Mighell v. Sultan of Johore* (1894), 1 Q. B. 149, 159, 63 L. J. Q. B. 593, in which the defendant was sued for a breach of promise to marry the plaintiff. At the time he engaged to marry plaintiff, he was residing in England under the name of Albert Baker, and represented himself to be a private individual and subject of the Queen. Yet the court held that he could not be called to answer in the courts of England, for the breach of this promise, although it was accompanied by deceit; that there could be no inquiry by the court into his conduct, he being an independent sovereign and not submitting to the jurisdiction. *Statham v. Statham and The Gaekwar of Baroda* (1912), Prob. Div. 92, 81 L. J. P. 33, the name of the second defendant was struck out as co-respondent in a divorce suit, because he was a ruling prince.

28. The Federal Government has provided a court of claims for the decision of many cases which it consents to be brought against it.

The principal classes of demands which may be litigated in that court, are claims founded on laws of Congress, on regulations of executive departments, on contracts express and implied and on claims specially referred to the court by Congress. See U. S. R. S. § 1059 et seq. This court has no jurisdiction of claims against the government for a mere tort. *Schillinger v. U. S.*, 155 U. S. 163, 15 Sup. Ct. R. 85 (1894); *Bigby v. U. S.*, 188 U. S. 400, 23 Sup. Ct. 468 (1902). Most of our states have created similar tribunals, in which they permit themselves to be sued upon specific causes of action. As this permission is altogether voluntary, on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it can be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. *Beers v. Arkansas*, 20 How. (U. S.) 527, 529 (1857); *Locke v. State*, 140 N. Y. 480, 482; 35 N. E. 1076 (1894); *Troy, Etc. Ry. v. Commonwealth*, 127 Mass. 43 (1879). Virginia prides

right will not lie in England, for the redress of such a tort,³⁹ because "the King can do no wrong." From this maxim, it follows as a necessary consequence that the king cannot authorize a wrong; for to authorize a wrong to be done is to do a wrong. As in the eye of the law no such wrong can be done so, in law, no right to redress can arise, and the petition which rests on such a foundation falls at once to the ground.⁴⁰

44. Liability of Ministerial Officers. But, while the injured

herself on her early adoption of the policy "to allow to the citizen the same use of her courts against herself which she has against the citizen; the largest liberty of suit." *Higginbotham's Executors v. Commonwealth*, 25 Gratt. 627, 639 (1874).

In *United States v. Lee*, 106 U. S. 196, 206, 1 Sup. Ct. R. 240 (1882), Justice Miller expressed the opinion that "As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every state, wherever it may reside, shall not be compelled by process of courts of its own creation, to defend itself from assaults in those courts." In *Nichols v. United States*, 7 Wall. 122, 126 (1868), Justice Davis said: "The principle (of immunity from suit) is fundamental, applies to every sovereign power, and, but for the protection which it affords, the government would be unable to perform the various duties for which it was created."

³⁹ *The Queen v. Lords Commissioners of the Treasury*, 1 Eng. Rul-

ing Cases 802; English Notes, p. 815. The petition lies for breach of contract, for restitution of lands or compensation in money, or for the fair value of services rendered to the government, but not for a pure tort, done by a person in the government service.

⁴⁰ *Feather v. The Queen*, 6 B. & S. 257, 295 (1865). In *Kawananakoa v. Polyblank*, 205 U. S. 349, 27 Sup. Ct. 526 (1907), it is said by Justice Holmes: "Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (*Leviathan*, c. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. '*Car on peut bien recevoir loy d'autrui, mais il est impossible par nature de se donner loy.*' Bodin, *Republique*, 1, c. 8. Ed. 1629, p. 132. Sir John Elliot, *De Jure Malestatis*, c. 3. *Nemo suo statuto ligatur Necessitative*. *Baldus. De Leg. et Const. Digna Vox*, 2 Ed. 1496, fol. 51b, Ed. 1539, fol. 61."

subject or citizen has no remedy against the crown in England, or the State in this country, it follows from the maxim that the King can neither do nor authorize a wrong, that the authority of the king (the government with us), will afford no defense to an action, brought by a fellow subject or citizen, for an illegal act committed by a government officer. This position it has been judicially declared rests "on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the Crown on the one hand and the rights and liberties of the subject on the other."⁴¹ Accordingly if government officials acting under orders from the President of the United States take and hold possession of land without lawful authority, they are liable as trespassers, and the owner may have them ejected and recover possession.⁴² If the commandant of a national armory⁴³ or a commodore in the navy⁴⁴ is guilty of the infringement of a patent he is liable to an

41. Cockburn, C. J., in *Feather v. The Queen*, 6 B. & S. 257, 297 (1865).

42. *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. R. 240 (1882). This suit was brought against the officers in possession of the Arlington Estate, but the United States intervened, and prosecuted the appeal to the Supreme Court. In the prevailing opinion, Justice Miller declares: "No man in this country is so high that he is above the law. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. * * * Shall it be said, in the face of all this and of the acknowledged right of the judiciary to decide, in proper cases, statutes to be unconstitutional which have been passed by both branches of Congress and approved by the President, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, with-

out process of law, and without compensation, because the President has ordered it, and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights" pp. 220-1; *Hopkins v. Clemson College*, 221 U. S. 636, 644, 31 Sup. Ct. 654 (1911).

43. *Head v. Porter*, 48 Fed. 481, 45 A. L. J. 205 (1891).

44. *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. R. 443 (1895). In this case, the doctrine of former decisions was approved, that the United States have no more right than any private person to use a patented invention without license of the patentee, or making compensation to him. It was also held that a suit would not lie against the United States for the infringement, as such suit sounded in tort, and the United States have not consented to be lia-

action in tort therefor, although he has acted under the orders of the Secretary of the Navy, and has used the patent only for the benefit of the United States. So, the sergeant-at-arms of a legislative body is liable for false imprisonment, if he arrests a person upon an order of that body, which it has not lawful authority to make.⁴⁵ Still again, the unlawful order of a State Board of Health will not protect a person against a suit for damages, brought by one who has been injured by the enforcement of the order. Regard must be had to the maxim, "*Salus populi suprema lex*," but regard must also be had to the liberty of the citizen, and both principles must be given reciprocal play.⁴⁶

If the suit is really against the United States, or the State, as where it is brought to enjoin the use of a caisson gate in a government dry dock, contrary to the rights of the plaintiff, as patentee, it must fail, unless the government has consented to be sued in a tort action.^{46a}

ble to suits founded in tort, for wrongs done by their officers, though in the discharge of their official duties. "But," it was declared, "the exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person, whose right of property they have wrongfully invaded or injured, even by the authority of the United States;" citing *Little v. Barreme*, 2 Cranch. (U. S. Sup. Ct.) 169 (1804), and *Bates v. Clark*, 95 U. S. 204 (1877). At p. 209 of last cited case, Miller, J., says: "Whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians in time of peace, by orders emanating from a source which is itself without authority."

⁴⁵. *Kilbourn v. Thompson*, 103 U. S. 168, 2 Transcript R. 56, 23 A.

L. J. 227 (1881). The members of the House of Representatives who caused the issue of the order of arrest, were not liable, because of the Constitutional provision of Art. 1, § 6, *supra*, ¶ 34; but the plaintiff recovered a judgment for \$37,500 against the sergeant-at-arms. On appeal, the court ordered the verdict to be reduced to \$20,000, or to be set aside as excessive. The reduced sum was paid by a congressional appropriation. The subject of "Legislative Inquiries" is carefully considered in 1 Political Sc. Quar. 84.

⁴⁶. *Wilson v. Alabama, Etc. Ry.*, 77 Miss. 714, 28 So. 568 (1900), *cf.*; *Hurst v. Warner*, 102 Mich. 238, 60 N. W. 440, 26 L. R. A. 484 (1894); *Brown v. Murdock*, 140 Mass. 314, 3 N. E. 208 (1885).

^{46a}. *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 24 Sup. Ct. 820, 48 L. Ed. 1134 (1904). The dissenting opinion of Harlan and Peckham, JJ., is worthy of study.

45. Who are Ministerial Officers? They are officers upon whom the law confers neither judicial power nor the right to exercise discretion and judgment, but for whose conduct it works out a clearly defined line.^{46b} A postmaster is a good representative of this class. If he refuses to deliver mail to the person to whom it is addressed, without valid statutory authority for such refusal, he is liable in tort for the conversion of the mail, and the unlawful instructions of his superiors will be no defense.^{46c}

46. Acts of Military and Naval Officers. These may be divided into two classes: First, Those of superior officers towards their subordinates. If acts of this class are of a kind which would subject the actor to tort liability, were he not an official, he must be prepared to justify them on one of two grounds, viz.: (1) the express or implied assent of the plaintiff, or (2) valid authority conferred upon him by the government.⁴⁷ Second, Acts done by subordinates under the command of superior officers. If these acts are such as the superior had no legal authority to command, his orders will not excuse the subordinate.⁴⁸ If, however, they are of a kind which the superior is generally empowered to command, and the facts do not clearly disclose to the subordinate the illegality of the acts, the order of a superior officer will protect him.⁴⁹

46b. *Goetcheus v. Matthewson*, 61 N. Y. 420, 432 (1875).

46c. *Teall v. Felton*, 3 Barb. 512 (1848); 1 N. Y. 537 (1848); 12 How. (53 U. S.) 284 (1851). See *Hupe v. Sommer*, Kan. , 129 Pac. 136 (1913), holding a township trustee liable in damages for his failure to perform a duty, without the performance of which plaintiff's just claim against the township could not be paid. *Clark v. Miller*, 54 N. Y. 528 (1874).

47. *Wilson v. Mackenzie*, 7 Hill (N. Y.) 95, 42 Am. Dec. 54, with note (1845); *Reaves v. Ainsworth*, 219 U. S. 296, 31 Sup. Ct. 230 (1911), "to those in the military or naval service of the United States, military law is due process."

48. *Ex parte Milligan*, 4 Wall. (71 U. S.) 3, 18 L. Ed. 28 (1866).

49. *Riggs v. State*, 3 Cold. (Tenn.) 85, 91 Am. Dec. 272 (1866); *McCall v. McDowell*, 1 Abb. (U. S.) 212; *Fed. Cas. No. 8,673* (1867); *Ford v. Surget*, 97 U. S. 594, 24 L. Ed. 1018 (1878); *U. S. v. Clark*, 31 Fed. 710 (1887); *Commonwealth v. Shorthall*, 206 Pa. 165, 55 At. 952, 65 L. R. A. 193, 98 Am. St. R. 759 (1903); *Dicey's Law of the Constitution* (1 Ed.), 308-9, "A soldier may be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury, if he obeys it." *Superior Orders as Excuse for Homicide*, 17 Law Quar. Rev. 87 (1901).

And the superior officer is exempt from tort liability, if he acts within his constitutional authority and in good faith. The ordinary rights of the individual must yield to what the officer deems the necessities of the moment.^{49a}

§ 5. HARMS DONE UNDER THE POLICE POWER.

47. The State, in the proper exercise of its police power, may and often does inflict serious hardships upon individuals.⁵⁰ For these, the victims have no redress either against the State, or against its officers, agents, or servants, who act under its command. Accordingly, if the State orders all rags coming from certain regions, to be disinfected and the expense thereof to be paid by the owner, a particular owner has no right of action against the persons taking the rags for disinfection, though he may be able to prove that the rags in question were not infected.⁵¹ If the State prohibits the use of nets in fishing, and authorizes the seizure and destruction of the nets so used, its agents are not liable in trover to the owners of the nets thus destroyed.⁵² "To justify the State

49a. In *re Moyer*, 35 Colo. 159, 85 Pac. 190, 12 L. R. A. N. S. 979 (1904); *Moyer v. Peabody*, 212 U. S. 78, 29 Sup. Ct. 235 (1909), "Where the Constitution and laws of a State give the Governor the power to suppress insurrection by the National Guard, he may also seize and imprison those resisting, and is the final judge of the necessity for such action." Cf. *Franks v. Smith*, 142 Ky. 232, 134 S. W. 484 (1911), holding that the militia in that State have only the power of policemen and sheriffs to suppress disorder. N. Y. Military Law, Art. 1, § 14, deals with this topic.

50. *California Reduc. Co. v. Sanitary Reduc. Co.*, 126 Fed. 29 (1903). The second head-note is as follows: "Laws or ordinances enacted under the police power for the protection of the public health, reasonably adapted to that end, are not uncon-

stitutional because they may incidentally operate to deprive individuals of their property or its use without compensation, or interfere with their personal liberty, nor because they may give one person a monopoly of a certain business or occupation, private rights being required to yield in such case to the public good."

51. *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929, 20 L. R. A. 52, 59 Am. R. 113 (1887); cf. *Los Angeles County v. Spencer*, 126 Cal. 670, 59 Pac. 202 (1889), where a statute was held constitutional, that authorized State agents to abate insect pests in orchards, nurseries and like places, and which made the expense of the abatement a lien on the premises thus disinfected.

52. *Lawton v. Steele*, 152 U. S. 133, 136, 137, 14 Sup. Ct. 499 (1893), affirming same case in 119 N. Y. 226.

in thus interposing its authority in behalf of the public," said the court in *Lawton v. Steele*, "it must appear first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations." "Under this (the police) power it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by:⁵³ the demolition of such as are in the path of a conflagration;⁵⁴ the slaughter of diseased cattle:⁵⁵ the destruction of decayed or unwholesome food,⁵⁶ the prohibition of wooden buildings in cities,⁵⁷ the regulation of railways and other means of public conveyance,⁵⁸ and of interments in burial grounds:⁵⁹ the restriction of objectionable trades to certain localities:⁶⁰ the com-

7 L. R. A. 134, 23 N. E. 878 (1890); *Ga.* 390, 17 S. E. 907 (1892); *Munn Daniels v. Homer*, 139 N. C. 219, 57 S. E. 992, 3 L. R. A., N. S. 997 (1905); 783 (1896).

Cf. Ashon v. Board of Com'rs, 185 Fed. 221 (1911), distinguishing *Lawton v. Steele*, *supra*; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609 (1897).

^{53.} *Dewey v. White, M. & M.* 56 (1827); *Fields v. Stokely*, 99 Pa. St. 306 (1882).

^{54.} *Maleverer v. Spinke, Dyer*, 35b (1538); *Surocco v. Geary*, 3 Cal. 69 (1853); *Bowditch v. Boston*, 101 U. S. 16 (1879).

^{55.} *Loesch v. Koehler*, 144 Ind. 278, 41 N. E. 326 (1895); *Newark, Etc. Co. v. Hunt*, 50 N. J. L. 308, 12 At. 697 (1888). So, the killing of dogs, which are not put on the assessment rolls by their owners, may be authorized by statute; *Sentell v. New Orleans Ry.*, 166 U. S. 698, 17 Sup. Ct. 693 (1896).

^{56.} *Dunbar v. City of Augusta*, 90

^{57.} *First Nat. Bank of Mt. Vernon v. Sarlis*, 129 Ind. 201, 28 N. E. 434, 28 Am. St. R. 85 (1891).

^{58.} *Bluedorn v. Missouri Pac. Ry.*, 108 Mo. 439, 18 S. W. 1103, 32 Am. S. R. 615 (1891); *cf. N. W. Tel. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527 (1900), applying city ordinance regulating telegraph and telephone poles and wires.

^{59.} *Mayor, Etc., of Newark v. Wilson*, 56 N. J. L. 667, 20 At. 487 (1894); *Humphrey v. Church*, 109 N. C. 13, 18 S. E. 793 (1891).

^{60.} *City of Newton v. Joyce*, 166 Mass. 83, 44 N. E. 116 (1896); *Comm. v. Hubley*, 172 Mass. 58, 51 N. E. 448 (1898); *Weir's Appeal*, 74 Pa. 230 (1873); *Butcher's Union Co. v. Crescent City Co.*, 111 U. S. 746, 4 Sup. Ct. 652 (1883).

pulsory vaccination of children:⁶¹ the confinement of the insane or those afflicted with contagious diseases:⁶² the restraint of vagrants, beggars and habitual drunkards,⁶³ the suppression of obscene publications⁶⁴ and houses of ill fame:⁶⁵ and the prohibition of gambling houses⁶⁶ and places where intoxicating liquors are sold.”⁶⁷ So, the State may compel real-estate owners to bridge ditches which would otherwise obstruct the free passage or use of streets,⁶⁸ and it may fix a limit to the height of buildings within certain districts, if the limitation is based on reasonable grounds.^{68a}

48. Harms inflicted by Neighboring Land Owners. At common law, a man has a right to build a fence or other structure on his own land as high as he pleases, even though this is done for the sole purpose of annoying a neighbor, or shutting the sunlight from his windows or garden.⁶⁹ This right may be modified by legislation, however. A statute which declares that “a fence unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance,” is a proper exercise of the police power.⁷⁰ So is a statute which com-

61. *Morris v. City of Columbus*, 102 Ga. 792, 30 S. E. 850, 66 Am. St. Rep. 243 (1897).

62. *Compagnie Francaise v. State Board of Health*, 51 La. Ann. 645, 25 So. 591, 72 Am. St. R. 458 (1899).

63. *Comm. v. Morrissey*, 157 Mass. 471, 32 N. E. 664 (1892).

64. *Willis v. Warren*, 1 Hilton (N. Y.) 590 (1859); *Comm. v. Sharpless*, 2 S. & R. (Pa.) 91 (1815).

65. *L'Hote v. City of New Orleans*, 51 La. Ann. 93, 24 So. 608 (1899).

66. *U. S. v. Dixon*, 4 Cranch (U. S. C. C.) 107 (1830); *Ex parte Tattle*, 91 Cal. 589, 27 Pac. 933 (1891); *Booth v. People*, 186 Ill. 43, 57 N. E. 798, 78 Am. St. R. 229 (1900); *Woods v. Cottrell*, 55 W. Va. 476, 47 S. E. 275 (1904).

67. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273 (1887).

68. *Boise City v. Boise City Rapid Transit Co.* (Idaho), 59 Pac. 716 (1899).

68a. *Welch v. Swasey*, 214 U. S. 91, 29 Sup. Ct. 567 (1909), *aff'g* 193 Mass. 364, 79 N. E. 745, 23 L. R. A., N. S. 1160 (1907).

69. *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177 (1896); *Mahan v. Brown*, 13 Wend. (N. Y.) 261 (1835); *Falloon v. Schilling*, 29 Kan. 292; 44 Am. R. 642 (1883); *contra*, *Burke v. Smith*, 69 Mich. 380, 37 N. W. 838 (1888); *Flaherty v. Aloran*, 81 Mich. 52, 45 N. W. 381, 21 Am. St. R. 510 (1890).

70. *Ridehout v. Knox*, 148 Mass. 368, 19 N. E. 390 (1888); *Smith v. Morse*, 148 Mass. 407, 19 N. E. 393 (1888); *Lord v. Langdon*, 91 Me. 221, 39 At. 552 (1898); *Karasek v. Peter*, 22 Wash. 419, 61 Pac. 33

pels a land owner to plug abandoned oil-wells,⁷¹ or to refrain from the use of artificial means to increase the natural flow of gas from a well,⁷² or which regulates the cutting of forests.^{72a}

49. Legalizing Nuisances—Britain. As the State may declare property to be a nuisance, so, on the other hand, it may legalize a nuisance. In Great Britain, the power of parliament is unlimited in this direction. Accordingly, if an act of parliament authorizes a railroad to construct and maintain a station for loading and unloading cattle, the company will not be liable to those owning property near the station, though the latter be of such a character as to amount to a nuisance, at common law. "No doubt, * * * when compensation is not given to those interested in the neighboring land, this is, as against them, harsh legislation;" but it is valid legislation.⁷³

50. In the United States. Such is not the rule, however, in this country. Legislation of the sort just referred to is unconstitutional with us, because falling within the prohibition against depriving a person of his property without due process of law, or against taking private property for public use without just compensation.⁷⁴ Accordingly, a federal statute, authorizing a railroad

(1900). The tendency appears to be towards a strict construction of such a statute. In *Brostrom v. Lauppe*, 179 Mass. 315, 60 N. E. 785 (1901), it was held not applicable to a fence located wholly on defendant's land, from three to ten feet from the line.

71. *Hague v. Wheeler*, 157 Pa. 324, 27 At. 714 (1893).

72. *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576 (1900), affirming S. C. in 150 Ind. 698, 50 N. E. 1125 (1898); *Manufacturers' Gas Co. v. Indiana Natural Gas Co.*, 156 Ind. 679, 59 N. E. 169 (1901); *Lindsley v. Nat. Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 24 Ann. Cases 160 with note (1911).

72a. *Opinions of Justices*, 103 Me. 506, 69 At. 627, 13 Ann. Cas. 745, 19

L. R. A., N. S. 422 (1907).

73. *London and Brighton Ry. Co. v. Truman*, 11 A. C. 45, 55 L. J. Ch. 354 (1885); cf. *Metropolitan Asylum District Co. v. Hill*, 6 A. C. 193, 50 L. J. Q. B. 353 (1881). The distinction between the two cases is stated by Lord Chancellor Halsbury as follows: "A small-pox hospital might be built and maintained, if it could be done without creating a nuisance, whereas the Railway Acts are assumed to establish the proposition that the railway might be made and used, whether a nuisance were created or not."

74. See United States Constitution Amendments 5 and 14, Constitution of N. Y., Art. 1, §§ 6, 7. See *United States v. Lynah*, 188 U. S. 445, 23 Sup. Ct. 349 (1902), holding

corporation to bring its track within the city limits of Washington, and construct such works as were necessary and expedient for the completion and maintenance of its road, is not to be construed as authorizing the erection and maintenance of an engine house and repair shop, so near to a church edifice as to render it unfit for use as a place of public worship. Such a construction would render the statute unconstitutional. Said the United States Supreme Court, "whatever the extent of the authority conferred, it was accompanied with this qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property."⁷⁵ It was held, therefore, to be no answer to the action by the religious corporation, whose church was rendered uncomfortable and almost unendurable as a place of worship, that defendant was authorized by act of Congress to construct its line and terminal facilities within the city of Washington, nor that its engine-house and repair shop were properly built and conducted without negligence, nor that the chimneys were of the height required by the city ordinances.⁷⁶

51. The same doctrine has been maintained by the State courts; and private corporations⁷⁷ as well as municipal corporations⁷⁸

the United States liable for property taken by it. Constitution of Penn., Art. 1, § 10, and Art. 16, § 8; Const. of Va., Art. 5, § 14. See *Williams v. Parker*, 188 U. S. 491, 23 Sup. Ct. 440 (1902), holding the Massachusetts high building statute constitutional, as it provides for compensating property owners, who are prohibited from building above a specified height.

75. *Baltimore and Potomac Ry. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719 (1883); approved in case between the same parties, 137 U. S. 568, 11 Sup. Ct. 185 (1891).

76. Cf. *Georgia Ry., Etc. Banking Co. v. Maddox*, 116 Ga. 64, 42 S. E. 315 (1902), holding that injuries and inconveniences to per-

sons residing near a terminal yard, located at a point authorized by statute, and operated in a proper manner, are not actionable. The smoke, noises and the like are not nuisances, but the necessary concomitants of the franchise. Accord. *Twenty-Second Corp., etc., v. Oregon Short Line Ry.*, 36 Utah, 238, 103 Pac. 243 (1909); *Dolan v. Chic. M. & St. P. Ry.*, 118 Wis. 362, 95 N. W. 385 (1903).

77. *Brown v. Cayuga, Etc. Ry. Co.*, 12 N. Y. 486 (1885); *Cogswell v. New York, Etc. Ry. Co.*, 103 N. Y. 10, 8 N. E. 537 (1886); *Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18, 25 N. E. 246 (1890); *Garvey v. Long Island Ry.*, 159 N. Y. 323, 54 N. E. 57 (1899); *Evans v. Chicago, Etc.*

have been held liable to neighboring property owners for nuisances in connection with works which they were expressly authorized by statute to construct. In *Cogswell v. New York, New Haven & Hartford Railway Company*,⁷⁹ the trial court found that defendant's engine-house practically deprived the plaintiff of the use of her dwelling-house, by filling it with smoke and dust, and by corrupting and tainting the atmosphere with offensive gases; but it denied relief to her on the ground that defendant, as a railroad corporation was authorized by statute to acquire real estate for an engine-house; that an engine-house at the point where this one was erected, was necessary for the operation of the road: that in the construction and use of the engine-house and coal-bins, it had exercised all practicable care, and, therefore, the harm sustained by plaintiff was *damnum absque injuria*. This decision was sustained by the general term, but was reversed by the Court of Appeals, on the ground that the State legislature had not authorized the wrong of which the plaintiff complained; and this rule of statutory construction in such cases was announced: "The statutory sanction, which will justify an injury to private property, must be express or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing the very act which occasioned the injury."^{79a}

Ry., 86 Wis. 597, 57 N. W. 354 (1893); *kell v. New Bedford*, 108 Mass. 208 (1871); *Bacon v. City of Boston*, 154 Mass. 100, 28 N. E. 9 (1891); *Edmondson v. City of Moberly*, 98 Mo. 523, 11 S. W. 990 (1889); *Nevins v. Fitchburg*, 174 Mass. 545, 55 N. E. 321 (1899); *Hill v. The Mayor, Etc.*, 139 N. Y. 501, 34 N. E. 1090 (1893); *Morton v. The Mayor, Etc.*, 140 N. Y. 207, 35 N. E. 490 (1893).
⁷⁹. 103 N. Y. 10, 8 N. E. 537 (1886).
^{79a}. In *Bates v. Holbrook*, 171 N. Y. 460, 471, 64 N. E. 181 (1902), it is said: "The fact that the defendants are engaged in a public work is no defense to the charge that the structures in front of plaintiff's hotel are a nuisance."

⁷⁸. *Proprietors of Locke v. Lowell*, 7 Gray (Mass.) 223 (1856); Has-

Even had express authority been given by statute to build and maintain the engine-house, it would have afforded the defendant no protection.⁸⁰ In the language of the Supreme Court of Massachusetts, "the legislature may authorize small nuisances, without compensation, but not large ones."⁸¹ Hence a statute, expressly authorizing the ringing of bells, and the use of steam whistles and of gongs by employers to give notice to their workmen, will protect the employers from actions by neighbors, although such noises have been adjudged common law nuisances and enjoined as such by the courts, before the statute is passed.⁸²

80. *Bellinger v. New York Central Ry.*, 23 N. Y. 42, 48 (1861). In this case the defendant was expressly authorized to build a particular bridge, which plaintiff claimed caused injury to his land by choking the throat of the stream and throwing back a flood upon his premises. The court said: "If a corporation or an officer should be authorized by statute to take the property of individuals for any purpose, however public or generally beneficial, without compensation, or for a private use making compensation, the pretended authority would be wholly void, and of course could afford no protection. But this limitation has no application to cases where property is not taken, but only subjected to damages consequential upon some act done by the State or pursuant to its authority." The damage, in the case then before the court, was declared to be consequential. See *Selfert v. City of Brooklyn*, 101 N. Y. 136, 144, 4 N. E. 321 (1896).

81. *Bacon v. City of Boston*, 154 Mass. 100, 28 N. E. 9 (1891). In this case, it was held that the statute did attempt to authorize a nuisance of so serious a nature as to amount to a taking of property. If the city

82. *Sawyer v. Davis*, 136 Mass. 239 (1884). The court said: "It is then argued that the legislature cannot legalize a nuisance, and cannot take away the rights of defendant as they have been ascertained and declared by the court; and this is undoubtedly true, so far as such rights have become vested. For instance, if the plaintiff under an existing rule of law has a right of action to recover damages, for past injury suffered by him, his remedy cannot be cut off by an act of legislature. So, also, if, in a suit in equity to restrain the continuance of a nuisance damages have been awarded to him, or costs of suit, he would have an undoubted right to recover them, notwithstanding the statute. But, on the other hand the legislature may define what in the future shall constitute a nuisance, such as will entitle the person injured thereby to a legal or equitable remedy, and may change the existing law rule on the subject. This legislative power is not wholly beyond the control of the courts, because it is restrained by the constitutional provision limiting it to wholesome and reasonable laws, of

52. Taking Private Property. On the other hand, the legislature can neither authorize the total destruction of property without making compensation, nor can it authorize permanent and substantial injury to such property without making compensation.⁸³ Whether the authorized nuisance amounts to a taking of property of the victim, or inflicts but trifling, indirect or consequential injury, may be a difficult question of fact, in a particular case,⁸⁴ but the rule of law, to be applied when the fact is determined, is clear and unquestioned. It has been judicially declared: "Under the police power of the State, the legislature has power to declare property which may be used only for an unlawful pur-

which the court is the final judge; but within this limitation, the exercise of the police power of the legislature will apply to all within the scope of its terms and spirit." Cf. *Tyler v. City of Lansingburgh*, 37 Misc. (N. Y. Sup. Ct.) 604 (1902), holding that when the legislature abolishes a village, against which a person has a cause of action, the municipal corporation, into which the village is merged, becomes liable and is properly substituted as defendant.

83. *Lexington & Ohio Ry. v. Applegate*, 8 Dana (Ky.) 289 (1839); *Hill v. Mayor, etc.*, 139 N. Y. 501, 34 N. E. 1090 (1883). Said Judge Finch, in this case: "Obviously the general doctrine which levies upon individuals forced contributions for the benefit of the public, and denies compensation for the injury done, is vulnerable at two points. It is defeated by construing the harm inflicted into the taking of private property, for which compensation must be made, and sometimes by a rigid construction of the authority claimed. Both methods indicate a lurking doubt of the equity of the general doctrine, and a disposition to narrow the field of its operation."

Garvey v. Long Island Ry., 159 N. Y. 323, 54 N. E. 57 (1889).

84. *Beldman v. Atlantic City Ry.*, 19 At. 731 (N. J. Ch.) (1890); *American Bank Note Co. v. New York El. Ry.*, 129 N. Y. 252, 29 N. E. 302 (1891); *Marchant v. Pennsylvania Ry.*, 153 U. S. 380, 14 Sup. Ct. 894 (1894); *Gibson v. United States*, 166 U. S. 269, 17 Sup. Ct. 578 (1897); *Meyer v. City of Richmond*, 172 U. S. 95, 19 Sup. Ct. 106 (1898); *Long v. City of Alberton*, 109 Ga. 28, 34 S. E. 333 (1899), (A Prison; no recovery); *Frazer v. City of Chicago*, 186 Ill. 480, 57 N. E. 1055 (1900); (A small-pox hospital, no recovery); *Muhlker v. N. Y. & H. Ry.*, 173 N. Y. 549, 66 N. E. 558 (1903), (Changing grade of railway track in a city street); *Bedford v. U. S.*, 192 U. S. 217, 24 Sup. Ct. 238 (1904), (Damage to land as the result of revetments along the Mississippi are consequential); *Mo. Pac. Ry. v. Nebraska*, 217 U. S. 196, 30 Sup. Ct. 461 (1910), (A taking of property); *Northern Pac. Ry. v. Ry. Commissioners*, 58 Wash. 360, 108 Pac. 938 (1910), (A similar holding); *Bacon v. Boston & Me. Ry.*, 83 Vt. 421, 76 At. 128 (1910), (not a taking of property).

pose to be a public nuisance, and authorize the same to be abated summarily by public officers; but if property, of a nature innocent in itself and susceptible of a beneficial use, has been used for an unlawful purpose, a statutory provision subjecting it to summary forfeiture to the State as a penalty or punishment for the wrongful use, without affording the owner thereof opportunity for a hearing, deprives him of his property without due process of law.^{84a}

In several States, the constitution provides that "private property shall not be taken or damaged for public use without just compensation."⁸⁵ Under such a provision, recovery may be had whenever the plaintiff's property has been damaged by any public improvement, whether the damage is caused by an actual physical invasion of the property, or indirectly by diminishing its saleability or its rental value.⁸⁶

52a. Destruction of Property under the Police Power: In the exercise of its police power, the State may authorize the summary destruction of private property, as we have seen. An officer who seizes and destroys property under such authority has the burden of proving a justification.⁸⁷ If the statute authorizes the summary killing of animals having the glanders, an adjudication by the local cattle commissioners that a horse had the glanders, is not

84a. *McConnell v. McKillip*, 71 Neb. 712, 99 Pac. 505, 69 L. R. A. 610 (1904); *DeGeofroy v. Merchants' Bridge Co.*, 179 Mo. 698, 79 S. W. 387, 64 L. R. A. 179 (1903); *State v. Chic., M. & St. P. Ry.*, 114 Minn. 122, 130 N. W. 545, 23 Ann. Cas. 1030 (1911); *Smith v. St. P., M. & M. Ry.*, 39 Wash. 355, 81 Pac. 840, 70 L. R. A. 1018, 109 Am. St. R. 889 (1911).

85. *Osborne v. Missouri Pac. Ry.*, 147 U. S. 248, 13 Sup. Ct. 299 (1892), applying Art. 11, § 21, of Mo. Const.; *City Council of Montgomery v. Townsend*, 80 Ala. 489, 2 So. 155 (1886); *Hot Springs Ry. v. Williamson*, 45 Ark. 429 (1885); *Weyl v. Sonoma Valley Ry.*, 69 Cal. 202, 206 (1886); *City of Atlanta v. Green*, 67 Ga. 386 (1881); *Gottschalk v. Chicago, etc., Ry.*, 14 Neb. 550 (1883); *Reading v. Althouse*, 93 Pa. 400 (1880); *Spencer v. Mount Pleasant Ry.*, 23 W. Va. 406 (1884); *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820 (1888), applying the provision of Ill. Const., and following *Rigney v. Chicago*, 102 Ill. 64 (1882). A narrower construction is put upon a similar provision in *Twenty-second Corporation, etc., v. Oregon Short Line*, 36 Utah, 238, 103 Pac. 243 (1909). **87.** *Lawton v. Steele*, 152 U. S. 133, 142, 14 Sup. Ct. 499 (1893); *Woods v. Cottrell*, 55 W. Va. 476, 47 S. E. 275 (1904).

conclusive against the owner of the animal. Such an adjudication is not a defense to those killing the horse pursuant to an order thereunder, if in fact the horse did not have the disease.⁸⁸ "Of course," said the court, "there cannot be a trial by jury before killing an animal, supposed to have a contagious disease, and we assume that the legislature may authorize its destruction in such emergencies without a hearing beforehand. But it does not follow that it can throw the loss on the owner without a hearing. If he cannot be heard beforehand, he may be heard afterward. The statute may provide for paying him in case it should appear that his property was not what the legislature has declared to be—a nuisance, and may give him his hearing in that way. If it does not do so, the statute may leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them."^{88a}

53. Whether the destruction of property by public officers, under the authority of a statute, as a means of preventing the spread of fire or disease, is merely the regulation of rights created by necessity, which properly is referable to the police power, and which requires no provision for compensation, or whether it can be done only in the right of eminent domain, and with a provision for compensation, is a question upon which authorities differ.^{88b} Recent legislation, however, generally makes provision for compensation when valuable property is destroyed to stay fires,⁸⁹ or to prevent the spread of disease.^{89a} Property destroyed by the gov-

88. *Miller v. Horton*, 152 Mass. (1899), as to due process of law in 540, 26 N. E. 100 (1891). Such an suppression of a nuisance.

officer acts in a ministerial capacity, and is answerable for negligence: *Bair v. Struck*, 29 Mont. 45, 74 Pac. 69, 63 L. R. A. 481 (1903).

88b. *Kiser v. Board of Commissioners*, 85 Oh. S. 129, 97 N. E. 52, 39 L. R. A., N. S. 1029 (1911), and comments thereon, 25 Harv. L. R. 552.

88a. *Adams v. City of Milwaukee*, 144 Wis. 371, 129 N. W. 518 (1911), holding constitutional an ordinance authorizing the destruction of milk

89. *Bates v. Worcester Protection Department*, 177 Mass. 130, 58 N. E. 274 (1900).

which the tuberculin test showed to be diseased. The opinion digests decisions under similar legislation in other States. See *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. 55

89a. *Tappen v. State*, 146 N. Y. 44, 40 N. E. 499 (1895), plaintiff obtained \$1,400 for cows slaughtered under tuberculosis statute (N. Y. Agricultural Law, § 99).

ernment, in the course of military operations for the purpose of protecting the lives or health of its soldiers, is not taken for a public use, and such destruction does not subject the government or its officers to the duty of making compensation therefor.^{89b}

§ 6. DEFENSE OF SELF AND PROPERTY.

54. Inevitable Accident. A person, who inflicts harm upon another, in the defense of himself or his property, or by inevitable accident, is not liable therefor in tort. This has not always been the rule of English law. Anciently, our law, like every other primitive legal system, imposed an absolute responsibility upon the voluntary doer of harm. We have the record of a case, early in the fourteenth century, brought for battery of the plaintiff, in which the jury found, "that the plaintiff was beaten, but this was because of his own assault, since the defendant could not otherwise escape. It was nevertheless adjudged that the plaintiff should recover his damages * * * and the defendant to go to prison."⁹⁰ The Statute of Gloucester⁹¹ had already provided that the King should pardon one, who had been found by a jury to have killed another in self-defense or by misadventure, but a plea of self-defense does not seem to have been successfully interposed to a civil action for damages, until the opening of the fifteenth century:⁹² while the plea of misadventure or inevitable accident in civil cases, did not gain clear recognition for a century thereafter.⁹³ Even in the seventeenth century, we find eminent judges declaring that, "in all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering, * * * and the reason is because he that is damaged ought to be recompensed."⁹⁴

55. Defense of Family. Not only in defense of oneself, may a person inflict harm upon another without committing a tort, but

^{89b}. *Juragua Iron Co. v. U. S.*, 212 U. S. 297, 29 Sup. Ct. 385 (1909).

⁹⁰. Anonymous, *Year Book*, Ed. II, f. 381 (1319).

⁹¹. 6 Ed. 1, ch. 9 (1278).

⁹². *Chapleyn of Greye's Inne v. Lambert v. Bessey*, T. Raym. 421 — *Year Book*, H. 4, f. 8, pl. 40 (1691). (1400).

⁹³. *Responsibility for Tortious Acts*, VII *Harvard Law Review*, pp. 442-445, by Professor John W. Wigmore.

⁹⁴. *Bacon's Maxims*, 7 (1630);

he is equally privileged in defending his master,⁹⁵ or his servant,⁹⁶ or spouse,⁹⁷ or child,⁹⁸ or parent,⁹⁹ or brother.¹⁰⁰ In all such cases, the law treats plaintiff's harm as attributable to his own misconduct. In the language of Chief Justice Holt "If A strike B, and B strikes again, and they close immediately, and in the scuffle B mayhems A, that is *son assault*." ¹ A brings the harm upon himself and has no cause of action against B, so long as the latter uses no more violence than a reasonable man would, under the circumstances, regard necessary to his defense.² Whether a person acted reasonably in repelling an assault, or in believing that an assault was threatened, is a question for the jury. The one assailed "judges at the time, upon the force of the circumstances, when he forms and acts upon his belief, at the peril that a jury may think otherwise and hold him guilty. But he will not act at the peril of making that guilt, if appearances prove false, which would be innocence if they proved true."³ He need not wait until his assailant has given a blow, for perhaps it will come too late afterwards."⁴ On the other hand, he is not entitled to a verdict simply because he testifies that he believed he was about to be attacked.⁵ He must convince a jury that his belief was honest

95. Year Book, 14 H. 6, 24, pl. 72 (1436); Anonymous, Year Book, 21 Hy. 7, 39, pl. 50 (1505); Barfoot v. Reynolds, 2 Strange 953 (1734).

96. Seaman v. Cuppledick, Owen 150 (about 1610); Orton v. State, 4 Greene (Ia.), 140 (1853).

97. Leward v. Basely, 1 Lord Raym, 62 (1695); Staten v. State, 30 Miss. 619 (1856); Biggs v. State, 29 Ga. 723, 76 Am. Dec. 630 (1860).

98. Commonwealth v. Malone, 114 Mass. 295 (1873); Higgins v. Minaghan, 76 Wis. 301, 45 N. W. 127 (1890).

99. Obier v. Neal, 1 Houst. (Del.) 449 (1857); State v. Johnson, 75 N. C. 174 (1876).

100. State v. Melton, 102 Mo. 683, 15 S. W. 139 (1880).

1. Cockroft v. Smith, 2 Salk. 642 (1705).

2. Dole v. Erskine, 35 N. H. 503 (1857); Ogden v. Claycomb, 52 Ill. 365 (1869).

3. Shorter v. People, 2 N. Y. 193 (1849); Morris v. Platt, 32 Conn. 75, 83 (1864); Dannenberg v. Berkner, 118 Ga. 885, 45 S. E. 682 (1903).

4. Chapleyn of Greys Inn v. ——— Y. B., 2 H. 4, f. 8, pl. 40 (1400); State v. Sherman, 16 R. I. 631 (1889).

5. State v. Bryson, 2 Winston Law (N. C.) 86 (1864). In this case, the court said: "A prayer for instruction, which assumed that one's personal feelings and apprehensions, however eccentric or morbid these might be, determined the character of his conduct, was properly refused."

and well founded.⁶ "In other words, the law of self-defense justifies an act done in honest and reasonable belief of immediate danger. It does not rest on the actual, but on the apparent facts and the honesty of belief in danger."⁷ When one is attacked by a number of persons, he may act with more promptness, and resort to more forcible means to protect himself or his family, than in the case of attack by a single person.⁸

In defense of person or family, one may destroy animals or other noxious property without liability to the owner.⁹ And this exemption from liability is generally extended to persons who destroy dogs or similar animals, when they are unregistered or unmuzzled in violation of law.^{9a} But a dog is not a nuisance simply because he is permitted to lie where people may stumble over him.^{9b}

56. Defense of Property. The right to defend one's property, without liability for damages, necessarily inflicted upon others as an incident of the defense, has long been recognized. In one of the earliest reported cases on this topic, the defendant, in an action for assault, justified on the ground that the plaintiff came and took certain goods of the defendant, who bade him leave the goods, but he would not, whereupon defendant took them out of his possession, which was the assault complained of. Chief Justice Newton said: "If a man will take my horse from me, or anything which

6. *Rippy v. State*, 2 Head (Tenn.) 602, 47 N. W. 941 (1891); *Thornton v. Taylor*, 54 S. W. 16 (Ky.) (1899).

7. *New Orleans, etc., Ry. v. Jopes*, 142 U. S. 18, 23, 12 Sup. Ct. 109 (1891), holding the following charge erroneous: "If the conductor shot,

when there was in fact no actual danger, although from the manner, attitude and conduct of the plaintiff, the former had reasonable cause to believe, and did believe, that an assault upon him with a deadly weapon was intended, and only fired to protect himself from such apprehended assault, the company was liable for compensatory damages."

8. *Higgins v. Minaghan*, 78 Wis. 470, 129 N. Y. Supp. 455 (1911), reversing 128 N. Y. Supp. 190 (1910).

9. *Keck v. Halstead*, 3 Lutwyche, 481 (1699); see *Police Power*, supra, ¶ 52; and *Nuisance*, infra, ch. 14.

9a. *Dickerman v. Consolidated Ry.*, 79 Conn. 427, 65 At. 289 (1907); *Moore v. Mills*, 191 Mass. 56, 77 N. E. 638 (1906); *Fox v. Mohawk & H. R. Humane Soc.*, 165 N. Y. 517, 59 N. E. 353, 51 L. R. A. 681, 80 Am. St. R. 767 (1901); *State v. Clifton*, 152 N. C. 800, 67 S. E. 751, 28 L. R. A., N. S. 673 (1910); *McDerment v. Taft*, 83 Vt. 249, 75 At. 276 (1910).

9b. *McCluskey v. Wile*, 144 A. D.

belongs to me, and I will not suffer him to do it, although he is hurt, in this case I shall be excused. * * * For, since he was about to injure me, this malfeasance shall be said to be an assault upon me begun by him, and all this shall be said to be in defense of the goods and chattels of the defendant."¹⁰ During the period which has passed since that decision (nearly five centuries), it has remained undoubted law, that a man is justified in using whatever force is reasonably necessary to protect and maintain his rightful possession of property.¹¹

57. Recaption. Whether he is also justified in recapturing his property by force, is a question upon which the courts are not agreed. If the property can be considered as still in the owner's legal possession, although within the physical grasp of the wrongdoer; or if legal possession has been gained by force or fraud, and the owner makes fresh pursuit and promptly demands return of the property, the owner may safely use all reasonably necessary force to regain it.¹² Some courts have held that whenever a person has wrongful possession of the chattels of another, and refuses to surrender them upon the demand of the owner, the latter is justified in using force sufficient to defend his right and retake the chattels. If the owner was compelled by law to seek redress by action, for a violation of his right of property, say these courts, the remedy would often be worse than the mischief.¹³

The weight of authority, however, favors a distinction between cases where violence is used to retain possession and where it is employed to regain possession; holding it lawful in the former and unlawful in the latter.¹⁴ According to this view "the law

10. Anonymous, Year Book, 19 H. Johnson v. Perry, 56 Vt. 703 (1884).
6, f. 31, pl. 59 (1440).

13. Anonymous, Keilwey, f. 92, pl.

11. Anonymous, Year Book, 9 Ed. 4 (1506); Blades v. Higgs, 10 C. B. 4, f. 28, pl. 42 (1470); Taylor v. N. S. 713, 30 L. J. C. P. 347 (1861); Markham, Cro. Jac. 224 (1535); Alderson v. Walstell, 1 C. & K. 358 (1844); Motes v. Berry, 74 Ala. 374 (1827); Heminway v. Heminway, 58 (1883); Bliss v. Johnson, 73 N. Y. Conn. 443, 19 At. 766 (1890); Comm. 529 (1878).

v. Donahue, 148 Mass. 529, 20 N. E.

12. State v. Elliot, 11 N. H. 540, 171 (1889).
545 (1841); Gyre v. Culver, 47 Barb. 14. Storey v. State, 71 Ala. 328, (N. Y.) 592 (1867); Anderson v. 338 (1882); Sabre v. Mott, 88 Fed. State, 6 Baxt. (65 Tenn.) 608 (1872); 780 (1898); Andre v. Johnson, 6

does not permit parties to take the settlement of conflicting claims, into their own hands. It gives the right of defense but not of redress. The circumstances may be exasperating; the remedy at law may seem to be inadequate; but still the injured party cannot be arbiter of his own claim. Public order and the public peace are of greater consequence than a private right or an occasional hardship. Inadequacy of remedy is a frequent occurrence, but it cannot find its complement in personal violence.”¹⁵

This distinction seems to be ignored in England, at the present time.^{15a}

58. Reasonable Force: In defense of property, as in defense of person, one must act in a reasonable manner; and what is reasonable depends largely upon the circumstances of each case. One may go to much greater lengths in repelling another from his house, or in ejecting one therefrom, than in dealing with a trespasser to other parts of his premises, or to his personal property. In an early case, Chief Justice Fineux said: “If a man is in his house, and hears that such a one is coming to his house to beat him, he may well collect his friends and neighbors to help in the defense of his person. * * * One’s house is his castle and defense, where he may properly abide.”¹⁶ Two centuries later it is laid down as settled law that one may defend his house against

Blackf. (Ind.) 375 (1843); Bobb v. court, “One may justify the battery Bosworth, 16 Ky. (Littell’s Sel. Cas.) of another who will enter my house, 81 (1808); Watson v. Rinderknecht, for it is my castle.” According to 82 Minn. 235, 84 N. W. 798 (1901); State v. Patterson, 45 Vt. 308, 12 Bliss v. Johnson, 73 N. Y. 529, 533 Am. R. 200 (1873): “The idea embodied in the expression that a man’s house is his castle, is not (1878); Harris v. Marco, 16 S. C. 575 (1881).

15. Kirby v. Foster, 17 R. I. 437, 22 At. 1111 (1891).

15a. See an interesting article in 27 L. Q. R. 262 (1912), by C. A. Branston, on “The Forcible Recap- tion of Chattels;” Pollock on Torts (9th Ed.), 399; Salmond’s Law of Torts (2nd Ed.), § 49.

16. Anonymous, Year Book, 21 H. 7, f. 39, pl. 50 (1505). In Lawrence’s Case, 2 Rolle’s Abridgment, 548 (1609), it was held by the whole

that it is his property, and, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office or his barn. The sense in which the house has a peculiar immunity is, that it is sacred for the protection of his person and of his family.” *Fossbinden v. Svitak*, 16 Neb. 499, 20 N. W. 866 (1884).

a burglar by returning violence with violence.¹⁷ Even the killing of a person, in the actual resistance of an attempt to commit a felony upon or in a dwelling or other place of abode in which the slayer is, has long been deemed justifiable homicide.¹⁸ In defense of other property, however, the owner is not justified in taking life or in using dangerous weapons. If he stones¹⁹ or shoots²⁰ a trespasser he is liable for assault and battery. While he may repel with force²¹ an attempt to wrongfully enter upon his land or take chattels from his possession, yet, if the wrongdoer has peacefully gained entrance or possession, the owner cannot justify forcible ejection without first requesting him to depart.²² Even then, he must use no more force than is necessary to overcome the wrongdoer's resistance.²³

59. Defense against Animals. A person's property is often injured or threatened by animals belonging to another. Here, again, in defense of his property, one may do what is reasonably necessary for its protection, and no more. If a dog is in the act of destroying a fowl or sheep, the owner of the latter may kill the dog, if he has reason to believe that such killing is necessary to save his property.²⁴ He is not entitled, however, to destroy valu-

17. *Green v. Goddard*, 2 Salk. 641 196 (1863); *Tullay v. Reed*, 1 C. & (1705), Cf.; *When a Man's House is P. 6* (1823); *Thompson v. Berry*, 1 His Castle, 10 Al. L. J. 241. Cranch, C. C. 45 (1801); *Breiten-*

18. *Carroll v. The State*, 23 Ala. 28, 58 Am. Dec. 282 (1853); *Wharton* N. W. 402 (1887; *LichtenWallner v. Criminal Law* (7th Ed.), vol. 2, § Laubach, 105 Pa. 366 (1884).

1024; *Bishop's New Criminal Law*, § 858; *New York Penal Law*, § 1055. 23. *Collins v. Renison*, Sayer, 138 (1754); *Comm. v. Clark*, 2 Met. (43

19. *Cole v. Maunder*, 2 Rolle's Mass.) 23 (1840); *State v. Lazarus*, Abridgment, 548 (1635); *Connors* 1 Mill. (S. C.) 34 (1817).

v. Walsh, 131 N. Y. 590, 30 N. E. 59 (1892). 24. *Leonard v. Wilkins*, 9 Johns. (N. Y.) 233 (1812); *Livermore v.*

20. *Everton v. Esgate*, 24 Neb. 235, Batcheler, 141 Mass. 179, 5 N. E. 38 N. W. 794 (1888); *Bloom v. State*, 275 (1886); *Nesbett v. Wilbur*, 177 155 Ind. 292, 58 N. E. 81 (1900). Mass. 200, 58 N. E. 586 (1900);

21. *Harrison v. Harrison*, 43 Vt. Morse v. Nixon, 8 Jones' Law (53 417 (1871); *Hannabalson v. Ses-* N. C.) 35 (1866); *McChesney v. Wil-* sions, 116 Ia. 457, 90 N. W. 93 son, 132 Mich. 252, 93 N. W. 627 (1902); *Montgomery v. Comm.*, 98 (1903). In the last case the major- Va. 840, 36 S. E. 371 (1900). ity of the court held that the ques-

22. *McCarty v. Fremont*, 23 Cal. tion of necessity was for the jury.

able animals of his neighbor, simply because they are trespassers, even though they are habitual trespassers, and he has warned their owner to keep them at home or he will kill them.²⁵ His remedy is to impound them or sue for the damage done by them.²⁶ Generally, the killing of a trespassing domestic animal is not justifiable, unless it is engaged at the time in the destruction of property;²⁷ but wild animals,²⁸ or domestic animals which, because of mischievous habits, are a common enemy and nuisance,²⁹ may be killed, though the killing is not necessary to prevent any mischief impending at the moment. Ordinarily a landowner is not liable to the owner of trespassing animals, which have eaten poisoned food on the former's premises, unless he placed it there for the purpose of injuring them.³⁰ In some jurisdictions, statutory

State v. Churchill, 15 Idaho, 645, 98 Pac. 853, 19 L. R. A., N. S. 835, with valuable note (1909).

25. *Johnson v. Patterson*, 14 Conn. (1840); *Chapman v. Decrow*, 93 Me. 378, 45 At. 295 (1899); *Hodges v. Causey*, 77 Miss. 353, 26 So. 445 (1900); *Harris v. Eaton*, 20 R. I. 81, 37 At. 308 (1897).

26. *Ulery v. Jones*, 81 Ill. 403 (1876); *Clark v. Kellher*, 107 Mass. 406 (1871); *Matthews v. Flestel*, 2 E. D. Smith (N. Y.), 90 (1853); *Ford v. Taggert*, 4 Tex. 492 (1849). See note on this topic in 67 Am. St. R., pp. 293-295.

27. *Protheroe v. Mathews*, 5 C. & P. 581 (1833); *Bowers v. Horen*, 93 Mich. 420, 53 N. W. 535, 32 Am. St. R. 513, 17 L. R. A. 773 (1892); *Ten Hopen v. Walker*, 96 Mich. 236, 55 N. W. 657, 35 Am. St. R. 598 (1893); *Bost v. Mingues*, 64 N. C. 44 (1870).

28. *Aldrich v. Wright*, 53 N. H. 398, 16 Am. R. 339 (1873).

29. *Hubbard v. Preston*, 90 Mich. 221, 51 N. W. 209, 15 L. R. A. 259, with valuable note, 30 Am. S. R. 426 (1892); *Brill v. Flagler*, 23 Wend. (N. Y.) 354 (1840); *Fisher*

v. Badger, 95 Mo. App. 289, 69 S. W. 26 (1902). In this case the dog had broken into plaintiff's house and emptied a crock of milk. He was killed by defendant, the householder, as he jumped out of the house to escape. The court expressed the opinion that the killing was reasonably necessary to protect plaintiff's property from future depredations by the dog; and also that the dog was a nuisance.

30. *Gillum v. Sisson*, 53 Mo. App. 516 (1893); *Dudley v. Love*, 60 Mo. App. 420 (1894); *Stansfeld v. Bolling*, 22 Law Times, N. S. 799 (1870); *Cobb v. Cater*, 59 S. C. 462, 38 S. E. 114 (1901). The court was evenly divided in this case, two members approving the charge of the trial judge that, "If a man puts out poison to protect his property, and a dog invades his premises and gets the poison, the man would not be liable, but if he puts out the poison not for the protection of his property, but with the intent to kill his neighbor's dog he would be liable for damages." The other two judges thought the correct rule to be this:

authority is given to kill dogs that are in the habit of worrying sheep,³¹ or that are found doing mischief of any kind.³²

60. Accidental Harm: Primitive Rule. As stated on a former page, early English law did not recognize misadventure or accident as a defense to a criminal prosecution,³³ or a civil action.³⁴ Its doctrine was that "a man acts at his peril * * * if the act was voluntary, it was totally immaterial that the detriment which followed from it was neither intended nor due to the negligence of the actor."³⁵ Such was the current opinion of English lawyers, until about a century ago, if not later."³⁶ In an early case³⁷ Justice Littleton is reported as assenting to the statement of counsel: "If one assaults me and I cannot escape, and in self-defense I lift my stick to strike him, and in lifting it hit a man who is behind me, in this case he shall have an action against me, yet my act was lawful, and I hit him, *me invito*." and as adding, "If a man is damaged he ought to be recompensed." Nearly four hundred years later, a learned English judge³⁸ declared: "Looking into all the cases from the Year Book in 21 H. 7 down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass." Not until the case of *Stanley v. Powell*,³⁹ was this doctrine squarely rejected by an

"That a person, exercising the right to put out poison on his premises, shall act with such care as shall reasonably be expected of a man possessing ordinary prudence under the circumstances." fled that this was not by felony. And this was shown to the King, and the King, moved by pity, pardoned him the death. So let him be set free."

31. *Marshall v. Blackshire*, 44 Ia. 475 (1876); *Hinckley v. Emerson*, 4 Cow. (N. Y.) 351, 15 Am. Dec. 383 (1825).

32. *Simmonds v. Holmes*, 61 Conn. 1, 23 At. 702, 15 L. R. A. 253 (1891).

33. *Select Pleas of the Crown*, Vol. 1, pl. 114 (1244), "Roger of Stainton was arrested because in throwing a stone he by misadventure killed a girl. And it is testi-

34. *Supra*, ¶ 54.

35. Holmes, *The Common Law*, 82.

36. Pollock, *The Law of Torts* (9th Ed.), 138-151.

37. Anonymous, Y. B., 6 Ed. 4, f. 7, pl. 18 (1466).

38. Grose, J., in *Leame v. Bray*, 3 East, 593 (1803).

39. (1891), 1 Q. B. D. 86, 60 L. J. Q. B. 52. This is subjected to severe criticism in Beven's *Negligence* (3d Ed.), pp. 559-570.

English court, and the rule laid down that a person is not legally wronged, who suffers harm through the doing of a lawful act, in a lawful manner, by lawful means, and with due care and caution.

61. Modern Doctrine: In this country, such rule received judicial sanction at a much earlier day.⁴⁰ The case of *Brown v. Kendall*,⁴¹ contains a full exposition of the principles upon which the rule rests. Two dogs, belonging to the plaintiff and the defendant were fighting, when the defendant took a stick about four feet long and commenced beating the dogs in order to separate them. In raising the stick to strike the dogs he accidentally hit the plaintiff in the eye, inflicting a severe injury. It was held that "if, in doing this act, using due care and all proper precautions necessary to the exigency of the case to avoid hurt to others,"^{41a} in raising the stick for that purpose, he accidentally hit plaintiff in the eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. * * * To make an accident, or casualty, or as the law sometimes states it, inevitable accident," declared Chief Justice Shaw, "it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care

40. *Vincent v. Stinehour*, 7 Vt. 62 (1835): "The result of our examination is, that we think that there must be some blame or want of care and prudence to make a man answerable in trespass." *Harvey v. Dunlop*, Hill & Den. (N. Y.) 193 (1843). "If not imputable to the neglect of the party by whom it was done, or to his want of caution, an action of trespass does not lie, although the consequences of a voluntary act."

41. *Brown v. Kendall*, 6 Cush. (Mass.) 292 (1850); *Brown v. Collins*, 53 N. H. 442 (1873); *Spade v. Lynn*, etc., Ry., 172 Mass. 488, 52 N. E. 747, 70 Am. St. R. 298 (1889); *Dunton v. Allan Line S. S. Co.*, 116 Fed. 250 (1902), accord.

41a. In *Briese v. Maechtle*, 146 Wis. 89, 130 N. W. 893, 35 L. R. A., N. S. 574, with note (1911). "Plaintiff, a boy about ten years old, and defendant, a boy of the same age, attended the same school, and were friends. At recess both were playing in the schoolyard, and, as plaintiff was kneeling to shoot his marble, defendant came running around the schoolhouse, being chased by another boy, and accidentally ran into the plaintiff, knocking him over, so injuring plaintiff's eye that his sight was destroyed." It was held that the defendant was not liable, as he was exercising the degree of care ordinarily exercised by children of his age in like circumstances.

necessary to the exigency, and in the circumstances in which he was placed.”⁴²

Applying these principles, other courts have held that a person, who, in lawfully defending himself against an attack of A, accidentally and without negligence, harms B, is not liable to B for the harm.⁴³ Undoubtedly, when one is using fire-arms⁴⁴ or other dangerous instruments,⁴⁵ even though he is using them lawfully, he is bound to exercise a degree of care commensurate with the risk, and conduct will be deemed negligent and, therefore, tortious, which would be treated as not tortious, and hence not actionable, had the instrument been harmless.

When a person is suddenly and unexpectedly confronted by a terrible and impending danger, “the law presumes that an act or omission done or neglected under the influence of the danger is

42. In *Feary v. Met. Street Ry.*, Yett, 1 Cold. (41 Tenn.) 230 (1860), 162 Mo. 75, 99, 62 S. W. 452, 459 where defendant did not intend to (1901), it was held unnecessary to harm plaintiff, but his act was voluntary and unlawful. In *Wright v. Clark*, 50 Vt. 130, 135 (1877), defendant killed plaintiff's dog, unintentionally, as the result of shooting at a fox. The court held that as plaintiff were merely the result of accident, their verdict should be for defendant was under no obligation the defendant,” was correct. The to shoot at the fox, he was answerable for any injury which might happen from his voluntary shooting, either by carelessness or by accident. *Morris v. Platt*, 32 Conn. 75 (1864), follows *Brown v. Kendall*, supra.

43. *Paxton v. Boyer*, 67 Ill. 132 (1873). Defendant was knocked down by plaintiff's brother, and, on rising, struck plaintiff with a knife, wounding his arm. The jury found, by special verdict, that “the blow complained of was struck by the defendant without malice, and under circumstances which would have led a reasonable man to believe it was necessary to his proper self-defense.” Cf. *James v. Campbell*, 5 C. & P. 372 (1832); *Peterson v. Haffner*, 59 Ind. 130, 26 Am. R. 81, and note on p. 93 (1877); *Cogdell v.*

44. *Castle v. Duryee*, 2 Keyes (N. Y.) 169, 175 (1865); *Knott v. Wagner*, 16 Lea. (84 Tenn.) 481 (1886). In *Gilmore v. Fuller*, 198 Ill. 130, 65 N. E. 84 (1902), the court exempted the defendant from this doctrine, because he and plaintiff were engaged in an unlawful proceeding.

45. *Peterson v. Haffner*, 59 Ind. 130, 26 Am. R. 81 (1877); *Bullock v. Babcock*, 3 Wend. (N. Y.) 391 (1829).

involuntary." Any harm, therefore, which his involuntary act or omission inflicts upon others is deemed accidental.⁴⁶

62. Harm Inflicted by Lunatics. So long as the primitive notion prevailed that the doer of harm was absolutely responsible therefor, the insanity of the doer could afford no defense, either to a criminal prosecution or a civil action.⁴⁷ When this notion was so far modified, that misadventure or accident on the part of the doer became a defense, it would have been entirely logical for the courts to treat the acts or the omissions of lunatics as involuntary, and, consequently, not tortious but accidental.⁴⁸ This was not done, however, and the general rule is, to-day as it was centuries ago, that "if a lunatic hurt a man he shall be answerable in trespass."⁴⁹ An exception has been suggested in the case of torts, "in which malice and therefore intention is a necessary ingredient."⁵⁰ Again, in actions for slander, if it is shown that the defendant's insanity "was great and notorious, so that the speaking the words could produce no effect on the hearers," the plaintiff should fail, because it is manifest that he has sustained no legal damage.⁵¹ It has been hold that, "the doctrine which ren-

46. *Laidlaw v. Sage*, 158 N. Y. 73, Kent, 32 Md. 581 (1870); *Morain v.* 52 N. E. 679, 44 L. R. A. 216 (1899), *Devlin*, 132 Mass. 87, 42 Am. R. 423 S. P. in *Cleveland City Ry. v. Osborn*, 66 Ohio St. 45, 63 N. E. 604 399, 24 At. 902 (1890); *Krom v.* (1902); and *Stewart v. Central Vt. Ry.*, ... Vt. ..., 85 At. 745 (1913). In these cases defendant's conductors suddenly stopped the cars, in order to avoid injuring third parties, and the plaintiffs were thrown down by the jolting of the cars. No recovery was allowed.

47. 7 Harvard Law Review, 446.

48. Bishop, Non-contract Law, §§ 505-507; Piggott, Principles of the Law of Torts, 215.

49. *Weaver v. Ward*, Hob. 134 (1616); *Cross v. Andrews*, Cro. Eliz. 622 (1599) *Taggard v. Innes*, 12 U. C. C. P. 77 (1862); *McIntyre v. Sholty*, 121 Ill. 660, 13 N. E. 239, 2 Am. St. R. 140 (1887); *Cross v.*

50. *Jewell v. Colby*, 66 N. H. 399, 400, supra; *Williams v. Hays*, 143 N. Y. 442, 446, supra.

51. *Yeates v. Reed*, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43 (1838);

Dickinson v. Barber, 9 Mass. 225, 228, 6 Am. Dec. 58 (1812); *Bryant v. Jackson*, 6 Humph. (25 Tenn.) 199

(1845); *Irvine v. Gibson*, 117 Ky. 306, 77 S. W. 1106 (1904). In *Ches.*

& O. Ry. v. Childers, 149 Ky. 307, 310, 148 S. W. 46 (1912), the court

said: "While certain eminent law writers have criticised the doctrine,

ders an insane person responsible for what in a sane person would be called willful or negligent conduct, does not apply to the personal conduct of the master of a vessel, in case his incapacity to care for and navigate the ship resulted solely from exhaustion caused by his efforts to save the vessel during a storm," which continued for three days and nights.⁵² The court asks, "What careful and prudent man could do more than to care for his vessel until overcome by physical and mental exhaustion?" Grant that no careful and prudent man could do more, does it follow that the master, rendered insane by such overwork, is not liable for the destruction of the vessel caused by acts or omissions due to his insanity, when it is admitted by the court that he would have been liable, had his insanity come upon him in any other way? The distinction taken by the court seems to indicate a lurking suspicion of the unsoundness of the general rule, and its willingness to evade it, whenever evasion is possible.

63. Unsatisfactory Reasons: If we examine the reasons assigned for the rule, we shall not find them very satisfactory. One reason is that, "the law looks to the person damaged by another and seeks to make him whole, without reference to the purpose or the condition, mental or physical, of the person causing the damage."⁵³ But we have seen that the law abandoned that ground long ago.

Another reason is that "where a loss must be borne by one of two innocent persons it shall be borne by him who occasioned it."⁵⁴ This would render the defense of inevitable accident futile.

Still another reason is that public policy requires the enforcement of the rule, so that tort-feasors may not simulate insanity

it may be stated that, by the great weight of authority the law is well settled that an insane person, to the extent of compensation, is just as responsible for his torts as a sane person; and this rule applies to all torts, except, perhaps, those in which malice, and therefore intention, actual or imputed, is a necessary ingredient, like libel, slander, and malicious prosecution."

52. *Williams v. Hays*, 157 N. Y. 541, 43 L. R. A. 253, 52 N. E. 589 (1899). (A second hearing in the Court of Appeals.)

53. *Williams v. Hays*, 143 N. Y. 442, 447, 42 Am. St. R. 743, 745, 26 L. R. A. 153, 38 N. E. 449 (1894).

54. *Beals v. See*, 10 Pa. 56, 61, 49 Am. Dec. 573 (1848); *Karow v. Continental Ins. Co.*, 57 Wis. 56, 46 Am. R. 17 (1883).

as a defense to their harmful acts.⁵⁵ There would seem to be less danger of successful perjury by the defendant here, than in many accident cases. The rule is also supported on the ground of public policy, as tending to make a lunatic's relatives more careful about guarding him. But the occasional benefits derived from this tendency are small in comparison to the hardships resulting from the rule.⁵⁶

The tort liability of insane persons has rarely come before the courts of England for adjudication, but the *dicta* in reported cases⁵⁷ are generally in accord with the decisions in this country, as are also the few decided cases in the Colonial courts.⁵⁸ Text-writers, however, are disposed to favor the view that the act or omission of an insane person, which he has not the power of willing or intending, are to be looked upon in law as involuntary or accidental, and, therefore, acts or omissions which subject him to no tort liability.⁵⁹

§ 7. CONFLICTING RIGHTS.

64. Neighboring Land Owners. We have seen that the common law permits a land owner to build a fence or other structure on his own land as high as he pleases, even though the erection cuts off his neighbor's view, or shades his garden, or otherwise harms his property.⁶⁰ It also allows him to make excavations on his land, although these may result in the destruction of valuable springs or wells on his neighbor's premises, or may intercept or

^{55.} *McIntyre v. Sholty*, 121 Ill. 660, 13 N. E. 239, 2 Am. St. R. 140 (1887).

^{56.} On the second trial of *Williams v. Hays*, the trial court spoke of this rule as enunciating a "cruel doctrine." 157 N. Y., at p. 547.

^{57.} See those cited in preceding notes; and *Mordaunt v. Mordaunt*, L. R. 2 P. & D. 103, 142, 39 L. J. P. & D. 57, 59 (1870). A dictum that a lunatic is civilly answerable for a libel.

^{58.} *Taggard v. Innes*, 12 U. C. C. P. 77 (1862); *Donaghy v. Brennan*, 19 N. Z. L. R. 289 (1901).

^{59.} Clerk and Lindsell, *The Law of Torts*, pp. 39, 40; Piggott, *Principles of the Law of Torts*, pp. 215, 216; Pollock, *The Law of Torts* (9th Ed.), chap. 3, § 1, citing the above text; Lunacy in Relation to Contract, Tort and Crime, 18 Law. Quar. Rev. 21 (1902); Renton on Lunacy, pp. 64, 65. See, too, "Insanity and the Law of Negligence," by Wm. B. Hornblower, 5 Col. L. R. 278 (1905); Bevens on Negligence (3rd Ed.), 46-48; Salmond's *Law of Torts* (2nd Ed.), § 21.

^{60.} *Supra*, ¶ 48.

draw off beneficial subterranean waters.⁶¹ In such cases it is declared the land owner is exercising a right which the law accords to him as owner, without invading any legal rights of the neighbor. The maxim, *Sic utere tuo ut alienum non leadas*,^{61a} it is said "should be limited to causing injury to the right of another, rather than the property of another." Or to put it in another way, the common law secures to the land owner certain absolute rights of dominion; that is, rights which he may exercise without incurring legal liability, however harmful their exercise may prove to his neighbor, or however malevolent may be the spirit with which he exercises them. It gives to him all that lies beneath the surface, whether it is solid rock or porous ground, or venous earth, or part soil and part water. It permits him to dig indefinitely downwards and apply all that is there found to his own purposes at his free will and pleasure.⁶³ It also permits him to rear structures indefinitely upwards.⁶⁴

65. Limits of Land Owner's Privileges. If, however, he exceeds these privileges and invades a legal right of his neighbor,

61. *Greenleaf v. Francis*, 18 Pick. Hoyle v. Franklin Manufacturing (35 Mass.) 117 (1836); *Acton v. Co.*, 199 N. Y. 388, 92 N. E. 274, 33 Blundell, 12 M. & W. 324, 13 L. J. Ex. L. R. A., N. S. 1038 (1910), in support of an action for nuisance 289 (1843); *Chasemore v. Richards*, 7 H. L. C. 349, 29 L. J. Ex. 81 (1859); against an adjoining land owner *Mayor of Bradford v. Pickles* (1895), A. C. 587, 64 L. J. Ch. 759; *Roath v. Driscoll*, 20 Conn. 533 (1850); *Bradford Corporation v. Ferrand* (1902), 2 Ch. 655, 71 L. J. Ch. 859, opinion of Farwell, J., and authorities discussed; *Chatfield v. Wilson*, 28 Vt. 49 (1855); *Phelps v. Nowlen*, 72 N. Y. 39; *Miller v. Black Rock Springs Co.*, 99 Va. 747, 40 S. E. 27 (1901); Cf. *Smith v. City of Brooklyn*, 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664 (1899), and *Forbell v. City of New York*, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. R. 666 (1900).

63. *Acton v. Blundell*, 12 M. & W. 324, 13 L. J. Ex. 289 (1843).

64. *Mahan v. Brown*, 13 Wend. (N. Y.) 261 (1835); *Ridehout v. Knox*, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. R. 560 (1889); *Lovell v. Noyes*, 69 N. H. 263, 46 At. 25 (1898). This doctrine has been modified by statute in some States, supra, ¶ 48; *Horan v. Byrnes*, 72 N. H. 93, 54 At. 945, 62 L. R. A. 602 (1903).

61a. This maxim was applied in (1903).

as by maintaining a nuisance⁶⁵ or by diverting or unreasonably using a flowing stream,⁶⁶ or by accumulating water which percolates beneath the surface into his neighbor's land to its harm,⁶⁷ or by withdrawing the lateral support from his neighbor's land⁶⁸ he is liable to respond in damages for the injury.

It has been held, also, that a land owner invades a legal right of his neighbor, when, by means of wells and pumping stations, he forces the under-ground water from the neighbor's land into his wells, and thus deprives the neighbor of the natural supply of sub-surface water.⁶⁹

65. Aldred's Case, 9 Co. 59a (1610); Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911 (1891); Hanck v. Tidewater Pipe Line Co., 153 Pa. 366, 20 L. R. A. 642, 26 At. 644 (1893); Wilson v. Phoenix Powder Co., 40 W. Va. 413, 52 Am. St. R. 890, 21 S. E. 1035 (1895); Townsend v. Epstein, 93 Md. 537, 49 At. 629, 86 Am. St. R. 441 (1901); Davis v. Niagara Falls Co., 171 N. Y. 336, 64 N. E. 4, 89 Am. St. R. 817, 57 L. R. A. 545 (1902); Tremblay v. Harmony Mills, 171 N. Y. 598, 64 N. E. 501 (1902), leader from defendant's roof discharged water on the sidewalk, which froze and made the walk dangerous.

66. Watson v. New Milford Water Co., 71 Conn. 442, 42 At. 265 (1899).

67. Cooper v. Barber, 3 Taunt. 99 (1810); Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72 (1866); Gilmore v. Royal Salt Co., 84 Kan. 729, 115 Pac. 541, 34 L. R. A., N. S. 48 (1911). In the last case salt was piled on defendant's land and the brine percolated into plaintiff's land.

68. Thurston v. Hancock, 12 Mass. 220 (1815); Humphries v. Brogden, 12 Q. B. 739, 20 L. J. Q. B. 10 (1850); Gerst v. City of St. Louis, 185 Mo. 191, 84 S. W. 34 (1904).

69. Forbell v. City of New York, 164 N. Y. 522, 51 L. R. A. 695, 58 N. E. 644, 79 Am. St. R. 666 (1900). Said the court: "In the cases in which the lawfulness of interfering with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land has been recognized. In the absence of contract or enactment, whatever it is reasonable for the owner to do with his sub-surface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but may not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored

It has also been held ⁷⁰ that a land owner invades a legal right of his neighbor, by using in his gas-wells pumping machinery or other devices, by which the natural flow is greatly increased, and the common supply is injured or threatened with destruction. Said the court: "The right of each owner to take the gas from the common reservoir is recognized by the law, but this right is rendered valueless if one well owner may so exercise his right as to destroy the reservoir, or to change its condition in such manner that the gas will no longer exist there." * * * "The surface proprietors have the right to reduce to possession the gas found beneath. They could not be absolutely deprived of this right without a taking of private property. But there is a co-equal right in all such owners to take the gas from the common source of supply. The use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of others." ^{70a}

In Pennsylvania,⁷¹ however, the courts have declared that a land owner has the absolute right not only to sink wells for water,

in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it, prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired." Followed in *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 633, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. R. 35 (1903); *Burr v. Mac-lay Rancho Water Co.*, 160 Cal. 268, 116 Pac. 715 (1911); Cf. *Fisher v. Feige*, 137 Cal. 39, 69 Pac. 618 (1902), denying injunction to restrain upper riparian owner from denuding his land of forest, for the malicious purpose of diminishing the flow of a stream, and thus harming lower proprietor. *Meeker v. East Orange*, 77 N. J. L. 623, 74 At. 379, 25 L. R. A., N. S. 465 (1909), reversing 76 N. J. L. 435, 70 At. 360 (1908). See "Property Rights in Percolating Waters," by Edward W. Hatch, 1 Col. L. Rev. 505 (1901). Contra, *Huber v. Merkel*, 117 Wis. 355, 94 N. W. 354, 62 L. R. A. 589 (1903). *Forbell v. New York* is doubted in *Barclay v. Abraham*, 121 Ia. 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am. St. R. 365 (1903).

⁷⁰ *Manufacturers' Gas & Oil Co. v. Ind. Nat. Gas Co.*, 156 Ind. 679, 59 N. E. 169 (1900).

^{70a} *Accord, Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 71, 77 S. W. 368, 70 L. R. A. 558 (1903).

⁷¹ *Westmoreland, etc., Gas Co. v. De Witt*, 130 Pa. 235, 18 At. 724, 5 L. R. A. 731 (1889); *Jones v. Forest Oil Co.*, 194 Pa. 379, 44 At. 1074, 48 L. R. A. 748 (1900).

gas or oil, but to use the most effective machinery possible for the extraction of the largest possible product, even though such use diminishes the product of his neighbor's wells. According to this view: "The property of an owner of land in oil, water and gas is not absolute until it is actually within his grasp and brought to the surface." Until then, the water, oil and gas are declared to be "*minerals ferae naturae*, belonging to the land owner so long as they are on or in it and subject to his control, but when they escape and go to the land of another or come under another's control, the title of the former owner is gone."

In Iowa, while a land owner may sink wells to obtain a supply of water, without liability to his neighbor whose springs are thereby injured, he has no right to waste the water, nor to draw from the percolating sources solely for the purpose of depleting the springs.^{71a}

66. **Test of Permissible Use of Land.** On the other hand, it has been held that a land owner may blast rock, in the ordinary improvement of his premises, without liability to his neighbor for consequential harm; provided he acts with due care⁷² and does not commit trespass.⁷³ According to these authorities, "the test

71a. *Barclay v. Abraham*, 121 Ia. 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am. St. R. 365 (1903), following *Stillwater Co. v. Farmer*, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. R. 541 (1903).

72. *Booth v. R., W. O. Ry.*, 140 N. Y. 267, 24 L. R. A. 105, 35 N. E. 592 (1893); *Holland House Company v. Baird*, 169 N. Y. 136, 62 N. E. 149 (1901). There are dicta in *Fitzsimmons v. Braun*, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421 (1902), which are inconsistent with the foregoing doctrine, but the decision is not, nor are any of the cases cited in the opinion, irreconcilable with it. In every one, there was actual trespass by the defendant, or the source of injury was held to be a nuisance for which the defendant

was responsible. Cf. *Quinn v. Crimmings*, 171 Mass. 255, 50 N. E. 624, 68 Am. St. R. 420, 42 L. R. A. 101 (1898), in which Holmes, J., declares: "It is for the public welfare that buildings be put up, and here, as elsewhere, public policy and custom have to draw the line between opposing interests."

73. *Hay v. Cohoes Co.*, 2 N. Y. 159 (1849); *Sullivan v. Dunham*, 161 N. Y. 290, 55 N. E. 923, 76 Am. St. R. 274, 47 L. R. A. 715 (1900). In *Middlesex Co. v. McCue*, 149 Mass. 103, 21 N. E. 230, 14 Am. St. R. 402 (1889), it was held that the owner of a garden upon a slope of a hill may cultivate and manure it, without liability for damages to a pond at the foot of the hill.

of permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property having regard to all interests affected, his own and those of his neighbors, and having in view, also, public policy? " ⁷⁴ If, however, the blasting is continuous for a long period it may amount to an actionable nuisance. ^{74a}

67. Conditional Privilege of Defamation. The principle underlying the land owner cases is one of extensive and frequent application. In the law of defamation we shall find it playing an important part, under the title of "Conditional or qualified privilege." Not only may members of legislative bodies defame a person with impunity, as we have seen in a former connection; ⁷⁵ but so may an employer in giving a character to a servant, ⁷⁶ or any person in the discharge of a legal or moral duty, ⁷⁷ or in the pursuance of a legal right. ⁷⁸ The right to enjoy a good reputation, until forfeited by his misconduct, is accorded to every one by our

^{74.} Andrews, C. J., in *Booth v. R., v. Hire*, 49 La. Ann. 904, 22 So. 44, W. & O. R., 140 N. Y. 267 (1893). 62 Am. St. R. 675 (1897); *Redgate Accord*, *Hamlin v. Blankenberg*, 73 N. H. 258, 60 At. 1010 (1905); *Moore v. Berlin Mills Co.*, 74 N. H. 305, 67 At. 578, 11 L. R. A., N. S. 284 (1907). But if the defamation is published as a means of forcing the payment of a debt to the publisher, the privilege does not attach. *Beals v. Thompson*, 149 Mass. 405, 21 N. E. 932 (1889).

^{75.} *Supra*, ¶ 34; also *Hartung v. Shaw*, 130 Mich. 177, 89 N. W. 701 (1902), as to exemption from tort liability for defamatory statements in judicial proceedings.

^{76.} *Child v. Afflick*, 9 B. & C. 403 (1829); *Fresh v. Cutter*, 73 Md. 87, 20 At. 774, 10 L. R. A. 67, 25 Am. St. R. 577 (1890).

^{77.} *Harrison v. Bush*, 5 E. & B. 344, 25 L. J. Q. B. 25 (1855); *Stuart v. Bell*, 2 Q. B. 341 (1891); *Bayset*

^{78.} *Blackham v. Pugh*, 2 C. B. 611 (1836); *Baker v. Carrick*, 1 Q. B. 838, 63 L. J. Q. B. 399 (1894); *Caldwell v. Story*, 107 Ky. 10, 52 S. W. 850, 45 L. R. A. 735 (1899); *Hebner v. Great Northern Ry.*, 78 Minn. 289, 80 N. W. 1128, 79 Am. St. R. 387 (1899); *Western Union Tel. Co. v. Pritchett*, 108 Ga. 411, 34 S. E. 216 (1899). In the last case the black-listing of discharged servants was held not to be privileged.

law; and yet, "for the convenience and welfare of society,"⁷⁹ our law refuses to treat this as an absolute right. It balances "the needs and good of society against this right of the individual,"⁸⁰ and, in cases where it deems the former to outweigh the latter, grants the privilege of defamation. The courts have declared that "the business of life could not be well carried on,"⁸¹ if this privilege were not granted. To its exercise, however, are annexed certain conditions, which we shall consider more fully under the topic of defamation; the person making the defamatory statement must honestly believe that it is true,⁸² and must not make it with a malicious intention to injure its victim,⁸³ nor give it an unnecessarily wide publication.⁸⁴

68. Modern Industrial Competition. The adjustment of conflicting rights, in cases growing out of modern business practices, is proving to be a very difficult task; but the principle, upon which the courts generally profess to rest their opinions, is that which we have been considering. The right to make contracts, or to labor or to build up a business is not an absolute right. It is qualified by a like right in others. Hence it should not be accounted a tort for A to buy goods from B, which he knows B has contracted to sell to C;^{84a} and, in the absence of fraud⁸⁵ or some other inde-

79. Parke, B., in *Toogood v. Spyring*, 1 Cr. M. & R. 181 (1834). B. D. 237, 47 L. J. Q. B. 230, 37 L. T. N. S. 694 (1877); *Buisson v. Huard*,

80. *Post Publishing Co. v. Hallam*, 59 Fed. 530 (1893). 106 La. Ann. 768, 31 So. 293 (1901).

81. Parke, B., in *Toogood v. Spyring*, 1 Cr. M. & B. 181 (1834); Cf. *Blackburn, J., in Davies v. Snead*, L. R. 5 Q. B. 608, p. 611 (1870); 417, 9 At. 705, 60 Am. R. 622 (1887); *Redgate v. Roush*, 61 Kan. 480, 59 Pac. 1050 (1900).

84a. *Ashley v. Dixon*, 48 N. Y. 430, 8 Am. R. 559 (1872); *Daly v. Cornell*, 34 App. Div. 27, 54 N. Y. Supp. 107 (1898); *Roseneau v. Empire Circuit Co.*, 131 App. Div. 429, 115 N. Y. Supp. 511 (1909).

85. *Rice v. Manley*, 66 N. Y. 82 (1876). In this case, plaintiffs had

82. *Jackson v. Hopperton*, 16 C. B. N. S. 829, 10 L. T. N. S. 529, 12 W. R. 913 (1864); *Infra*, chap. X. agreed to buy a quantity of cheese of S. Defendant, knowing of this agreement, caused a telegram to be

83. *Carpenter v. Bailey*, 53 N. H. 590 (1873); *Clark v. Molyneux*, 3 Q. plaintiffs, to the effect that they did

pendent wrong⁸⁶ by A, the weight of judicial authority is in favor of treating such a purchase as not tortious towards C. The same rule should be applied to interferences with contracts for personal services or with opportunities to labor. In the absence of a statute on the subject, the fact, that the offer of high wages of one employer induces the servants of another to quit him and enter the service of the former, ought not to subject the offerer to an action in tort.⁸⁷ If the offer is *bona fide*, and is limited to persons not under contract to others, there is no semblance of authority for holding the offerer liable in tort to employers, who find themselves forced thereby to pay higher wages or lose their workmen.^{87a} Nor is it tortious for a laborer, or body of laborers, to refuse to work^{87b} with specified individuals, or with a particular class, and to follow that refusal with a peaceful strike, although such conduct may result in the tabooed laborers losing employment and wages which they would have secured, but for this interference.⁸⁸

not want the cheese, and that S. 34 Am. St. R. 171 (1891); *May v. Wood*, 172 Mass. 11, 51 N. E. 191 (1898); *Kline v. Eubanks*, 109 La. 241, 33 So. 211 (1902); Cf. *Jones v. Stanley*, 76 N. C. 355 (1877), holding that an action for damages lies against a person for maliciously persuading another to break any contract with plaintiff.

defendant's interference: *Angle v. Chicago, Etc. Ry.*, 151 U. S. 1, 13, 14 Sup. Ct. 240, 38 L. Ed. 55 (1893), is also a case of fraud on the part of defendant: Cf. *Nashville C. & Gt. L. Ry. v. McConnell*, 82 Fed. 65 (1897).

86. *Boysen v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233 (1893); *Pollock on Torts* (6th Ed.), 232; *Morasse v. Brochu*, 151 Mass. 567, 25 N. E. 74, 8 L. R. A. 524 (1890); *Ratcliffe v. Evans* (1892), L. R. 2 Q. B. 524, 61 L. J. Q. B. 535; *National Phonograph Co. v. Edison-Bell Co.* (1908), 1 Ch. 335, 77 L. J. Ch. 218.

87. See *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545,

87a. Cf. *Wolf v. New Orleans T. M. P. Co.*, 113 La. 387, 39 So. 2, 67 L. R. A. 65 (1904), where the defendant did not know of the servant's contract with plaintiff at the time of hiring him.

87b. *Kemp v. Division 241, Etc.*, 255 Ill. 213, 99 N. E. 389 (1912), reversing 153 Ill. App. 344 (1910).

88. *National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. R. 648, 58 L. R. A. 135 (1902). This is admitted in the dissenting opinion. *De Minico v. Craig*, 207 Mass. 593, 94 N. E. 317 (1911) is contra.

69. Inducing Breach of Contract. Since the publication of the first edition of this work, the question of the tort liability of one, who induces another to break his contract with the plaintiff, has received much consideration, both in England and in this country. At present, the prevailing view is that such conduct is actionable, unless the defendant can show some legal justification for his interference.^{88a}

70. Rival Business. Again, it is not an actionable tort, to set up a rival business and thereby reduce the profits of an established proprietor, or even drive him out of trade. This has been the settled rule of English law for five centuries. In 1410, two masters of a grammar school at Gloucester "brought a writ of trespass against another master, and counted that the defendant had started a school in the same town, so that whereas the plaintiffs had formerly received 40d. or two shillings a quarter from each child, now they got only 12d. to their damage, etc." But the Court of Common Pleas were unanimous in holding that the plaintiffs should take nothing by this writ. Said Hill, J.: "There is no ground to maintain this action, since the plaintiffs have no estate, but a ministry for the time; and though another equally competent with the plaintiffs comes to teach the children, this is a virtuous and charitable thing, and an ease to the people, for which he cannot be punished by our law."⁸⁹ In other words, English law has encouraged free competition, holding that it is worth more to society than it costs.⁹⁰

71. Mogul Steamship Case. This is brought out very clearly in a modern English case.⁹¹ An associated body of traders endeav-

^{88a} *Quinn v. Leathem* (1901), A. C. 495, 70 L. J. P. C. 76; *South Wales Ala. 348*, 50 So. 1008 (1909).

Miners' Fed. v. Glamorgan Coal Co. ⁸⁹ *Anonymous*, Y. B. 11 H. 4, f. (1905), A. C. 239, 74 L. J. K. B. 525 47, pl. 21.

(1903), 1 K. B. 118, 2 K. B. 545, 72 L. J. K. B. 893; *Pollock on Torts Gunter*, 167 Mass. 92, 44 N. E. 1077, (9th Ed.), 337-340; *Bitterman v. Louisville & N. Ry.*, 207 U. S. 205, 28 (1896), citing *Comm. v. Hunter*, 4 Sup. Ct. 91 (1907); *Dr. Miles Med. Met. (Mass.)* 111, 134 (1842).

Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376 (1911)—plaintiffs not entitled to relief as the broken contract was invalid; *Ten-* ⁹⁰ *Holmes, J., in Vegelahn v. 57 Am. S. R. 443*, 35 L. R. A. 722 (1896), citing *Comm. v. Hunter*, 4 Sup. Ct. 91 (1907); *Dr. Miles Med. Met. (Mass.)* 111, 134 (1842).

⁹¹ *Mogul Steamship Co. v. McGregor*, 15 Q. B. D. 476, 54 L. J. Q. B. 540; S. C. again, 21 Q. B. D. 544, 57 L. J. Q. B. 541; S. C. again, 23 Q.

ored to get the whole of a limited trade (the tea carriage from certain Chinese ports) into their own hands, by offering exceptional and very favorable terms to customers who would deal exclusively with them; so favorable that but for the object of keeping the trade to themselves they would not offer such terms; and if their trading were confined to one particular period they would be trading at a loss, but in the belief that by such competition they would prevent the plaintiffs, as rival traders, competing with them, and so receive the whole profits of the trade to themselves.⁹² The plaintiffs, who were thus driven out of the tea carrying trade with China, insisted that the associated traders had acted unlawfully toward them and should respond in damages. Lord Chief Justice Coleridge, before whom the case was tried, ruled against the plaintiffs, and his view was sustained by the successive appellate tribunals.

In the Court of Appeals, Lord Justice Bowen,⁹³ after calling attention to the fact that the case presented an apparent conflict between two rights that are equally regarded by the law — the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others, said: "The acts of the defendants which are complained of here were intentional, and were also calculated, no doubt, to do the plaintiffs damage in this trade. But in order to see whether they were wrongful, we have still to discuss the question whether they were done without any just cause or excuse. * * * They have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. * * * I can find no authority for the doctrine that such a commercial motive deprives of just cause or excuse, acts done in the course of trade, which would, but for such motive, be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive of all

B. D. 598, 58 L. J. Q. B. 465; still ing rates." See Bowen, L. J., in 23 again (1892), A. C. 25, 61 L. J. Q. B. Q. B. D. at p. 611.

295, 66 L. T. 1, 40 W. R. 337.

⁹³. L. R. 23 Q. B. 598 (1889). This

⁹². See Lord Chancellor Halsbury's Statement of Facts (1892), A. C. at p. 35. This offer of low freights is popularly styled "smash-

trade. To say that a man is to trade freely, but to say that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible course of perfection. But we are told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not fair or reasonable. The offering of reduced rates by the defendants in the present case is said to have been unfair. This seems to assume that, apart from the fraud, intimidation, molestation, or obstruction of some other personal right *in rem* or *in personam*, there is some natural standard of 'fairness' or 'reasonableness' (to be determined by the internal consciousness of juries) beyond which competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason, for such a proposition. It would impose a novel fetter upon trade."

72. Unfair Competition. In the same Court, Lord Justice Fry declared: "To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts. Competition exists where two or more persons seek to possess or to enjoy the same thing; it follows that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition."

When the case was before the House of Lords, one learned Lord⁹⁴ asserted that "there is no restriction imposed by law on competition by one trader with another with the sole object of benefiting himself." Another⁹⁵ expressed the opinion that all trade competition is "fair," which is "neither forcible nor fraudulent." The Lord Chancellor⁹⁶ declared: "The whole matter comes around to the original proposition whether a combination to trade, and to offer, in respect of prices, discounts, and other trade facilities, such terms as to render it unprofitable for rival customers to pursue the trade is unlawful, and I am clearly of the opinion that it is not."

⁹⁴ Lord Hannen (1892), A. C. p. 59.

⁹⁵ Lord Bramwell, *ibid.* p. 47.

⁹⁶ *Ibid.* p. 40.

73. Fraudulent Injury to Business. This case has been cited frequently by American judges⁹⁷ and carefully followed by a number of courts.⁹⁸

It is generally agreed in this country, that a person, whose business is seriously injured, or destroyed by the fraudulent conduct of another deliberately planned to accomplish that end, has sustained an actionable tort.⁹⁹ The defendant was held liable in a case where it assumed a false name, in competing with plaintiff, and took away and destroyed plaintiff's display cards from his customers.^{99a}

74. Intimidation of Third Persons. There is also substantial unanimity of opinion that physical intimidation or molestation of third persons, resorted to for the purpose of coercing them to abstain from business relations with another, is tortious towards the one who is damaged by such coercion.¹⁰⁰ Whether the peaceful per-

97. *Van Horn v. Van Horn*, 52 N. J. L. 284, 20 At. 485 (1890); *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 At. 881 (1894); *Aikens v. Wisconsin*, 195 U. S. 199, 203, 204, 25 Sup. Ct. 3 (1904). about his personal and business character. *Brown v. Am. F. L. M. Co.*, 97 Tex. 599, 80 S. W. 985, 67 L. R. A. 195 (1904).

98. *Continental Ins. Co. v. Board of Fire Underwriters*, 67 Fed. 310 (1895); *Macauley v. Tierney*, 19 R. I. 255, 33 At. 1, 37 L. R. A. 455 (1895); *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591 (1901); *Standard Oil Co. v. U. S.*, 221 U. S. 1, 56, 31 Sup. Ct. 502 (1910). **99a.** *Dunshee v. Standard Oil Co.*, 152 Ia. 618, 132 N. W. 371, 36 L. R. A., N. S. 263 (1911); 126 N. W. 342 (1910).

99. *Rice v. Manly*, 66 N. Y. 82 (1876); *Angle v. Chicago, Etc. Ry.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55 (1893); defendant by bribery and corruption got control of the stock of the Omaha company, and caused the latter's officers to break a contract with plaintiff to latter's serious damage. *Van Horn v. Van Horn*, 52 N. J. L. 284, 20 At. 485, 10 L. R. A. 184 (1890), 56 N. J. L. 318, 28 At. 669 (1893). Defendants broke up plaintiff's business by fraudulent and deceitful statements **100.** *Quinn v. Leathem* (1901), A. C. 495, 70 L. J. P. C. 76, and cases cited therein; *Vegelahn v. Gunter*, 167 Mass. 92, 44 N. E. 1077 (1896), prevailing and dissenting opinions; *Kernan v. Humble*, 51 La. Ann. 389, 25 So. 451 (1899); *Southern Ry. Co. v. Machinists' Local Union*, 111 Fed. 49 (1901); *National Protective Association v. Cumming*, 170 N. Y. 315, 58 L. R. A. 135, 63 N. E. 369, 88 Am. St. R. 648 (1902), prevailing and dissenting opinions; *Barnes v. Chicago Typographical Union No. 16*, 232 Ill. 424, 83 N. E. 940, 14 L. R. A., N. S. 1018 (1908); *Jones v. E. Van Winkle G. & M. Works*, 131 Ga. 336, 62 S. E. 236, 17 L. R. A., N. S. 848, 127 Am. St. R. 235 (1908).

99. *Rice v. Manly*, 66 N. Y. 82 (1876); *Angle v. Chicago, Etc. Ry.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55 (1893); defendant by bribery and corruption got control of the stock of the Omaha company, and caused the latter's officers to break a contract with plaintiff to latter's serious damage. *Van Horn v. Van Horn*, 52 N. J. L. 284, 20 At. 485, 10 L. R. A. 184 (1890), 56 N. J. L. 318, 28 At. 669 (1893). Defendants broke up plaintiff's business by fraudulent and deceitful statements

suasion, or even the moral intimidation of third persons, intending to result, and actually resulting in damage to another, amounts to a tort toward him, is a question upon which judges differ. On the one hand, it is said that a threat of workmen to strike, or to boycott, having business ruin behind it for the person threatened, "may be as coercive as physical force;"¹ that the anathemas of a secret organization of men appointed for the purpose of controlling the industry of others by a species of intimidation, that works upon the mind rather than the body, are quite as dangerous and, generally altogether more effective than acts of actual violence;² that "when the will of the majority of an organized body in matters involving the rights of outside parties, is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats of intimidation."³

75. On the other hand, it is declared that threats to withhold or withdraw patronage; to strike, or even to peacefully boycott or picket, cannot be regarded as coercive in a legal sense;⁴ that intimidation or molestation to be legally coercive must have "an element of violence, or threat of violence, or actual trespass upon the person

1. Vann, J., in *Nat. Protective Association v. Cumming*, 170 N. Y. at p. 343. In *London Guarantee Co. v. Horn*, 206 Ill. 493, 69 N. E. 526 (1903), the court held that one who induces an employer to discharge an employee, by the threat to cancel an accident policy issued to the employer, unless he discharged the employee, was liable in tort to the latter. But see dissenting opinion.

2. *State v. Stewart*, 59 Vt. 273, 9 At. 559 (1887). Similar views are expressed in *Lucke v. Clothing Cutters*, 77 Md. 396, 26 At. 505 (1893); *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 23 L. R. A. 588 (1894); *Barg v. Essex Trades Council*, 53 N. J. Eq. 101, 30 At. 881 (1894); *Vege- lahn v. Gunter*, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. R. 443, 35 L. R. A. 722 (1896); *Hopkins v. Oxley Stave Co.*, 83 Fed. 912 (1897); *Webb v. Drake*, 52 La. Ann. 290, 26 So. 791 (1899); *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003, 80 Am. St. R. 17 (1900); *Booth v. Burgess*, 72 N. J. Eq. 181, 65 At. 226 (1906).

3. *Boutwell v. Marr*, 71 Vt. 1, 42 At. 607, 43 L. R. A. 803, 76 Am. St. R. 746 (1899). Accord, *Wilcutt & Sons v. Bricklayers' B. & P. U.*, 200 Mass. 110, 85 N. E. 897, 23 L. R. A. N. S. 1236 (1908); *Blanchard v. Newark Joint Dist. Council*, 77 N. J. L. 389, 71 At. 1131 (1909); *aff'd* without opinion 78 N. J. L. 737 (1910).

4. *Macauley v. Tierney*, 19 R. I. 255, 33 At. 1, 37 L. R. A. 455 (1895).

or property, or the threat of it;" ⁵ that "the policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interfering with a man's business by some means, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade. * * * If it be true that workingmen may combine, with a view among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has to support their interests by argument, persuasion and the bestowal or refusal of those advantages, which they otherwise lawfully control." ⁶

Courts holding this view have declared that it is not illegal for labor unions to publish and circulate a paper charging plaintiffs with being "unfair" to labor, and urging all friends of labor to withdraw their patronage from plaintiffs and transfer it to competitors who are friendly to the unions. Such conduct, it is said, does not infringe any legal right of plaintiffs.^{6a}

76. Difference of View Accounted for: The difference of view brought out in the foregoing extracts is attributable in part perhaps, to the different economic sympathies and political ideals of individual judges.⁷

Moreover, if, in all cases where one party, in the use of his property, or in the prosecution of his business, or in the exercise of his

⁵ Caldwell, J., in *Hopkins v. Oxley Stave Co.*, 83 Fed. at p. 935. Labor, 37 Mont. 264, 96 Pac. 127, 18 L. R. A., N. S. 707, with note, 127

⁶ Holmes, J., dissenting opinion in *Vegeahn v. Gunter*, 167 Mass. 92, 44 N. E. at p. 1081. Similar views are expressed in *Allen v. Flood* (1898), A. C. 1; *Baker v. Metropolitan Life (Ky.)*, 64 S. W. 913 (1901), and other Kentucky cases therein cited; *Saulsberry v. Coopers' Int. Union*, 147 Ky. 170, 143 S. W. 1018 (1912); *National Protective Association v. Cumming*, 170 N. Y. 315 (1902); *Guethler v. Altman*, 26 Ind. App. 587, 60 N. E. 355 (1901). Am. St. R. 122 (1908).

⁷ See a suggestive article by Mr. Justice Holmes, 8 Harv. L. Rev. 1 (1893), entitled *Privilege, Malice and Intent*. At p. 8, dealing with the *Mogul Steamship Company's Case*, he says: "The ground of decision really comes down to a proposition of policy of rather a delicate nature, concerning the merit of the particular benefit to themselves intended by the defendants, and suggests a doubt whether judges

^{6a} *Lindsay v. Montana Fed. of* with different economic sympathies

calling, intentionally so acts as to inflict loss upon another, the true inquiry is, was the act or use a reasonable exercise of defendant's legal rights, having regard to all interests affected, and having in view also public policy, we should expect different judges to answer the inquiry differently, even upon an agreed state of facts.⁸

Again, though the evidence be not conflicting, different judges will draw different inferences of fact therefrom. This is shown in *Vegelahn v. Gunter*,⁹ where Allen, J., writing for the majority, draws the inference from the report of the trial judge, that defendants indulged in threats of personal injury; while Holmes, J. (who made the report), declared such inference unwarranted.

77. Unlawful Combinations. Still again, many cases containing conflicting *dicta* are easily reconcilable when tested by the inquiry, "was the act or use complained of a reasonable exercise of defendant's legal rights?" A combination of persons for the purpose of destroying the business of another or preventing his obtaining employment, and which accomplishes its object, without subserving any legitimate interests of its members or of the public, is clearly unlawful and is responsible for the harm which it inflicts.¹⁰ Even though the combination uses its power to advance its own interests, if the object aimed at is a monopoly of the market

might not decide such a case differently when brought face to face with the issue." Compare, also, the majority and minority opinions in *Allen v. Flood* and *Hopkins v. Oxley Stave Co.*, *supra*. Also, a series of articles in 20 Harv. L. Rev. 253, 345, 429 (1907), by Professor Jeremiah Smith, entitled "Crucial Issues in Labor Litigations." the minority opinion asserts that the defendants had not exceeded the lawful limits of competition; that "products of labor-saving machinery are no more exempt from competition than hand-made products." *Huskie v. Griffin*, 75 N. H. 345, 74 At. 595, 27 L. R. A., N. S. 966, 139 Am. St. R. 718 (1909).

8. In *Hopkins v. Oxley Stave Co.*, 83 Fed. 912 (1897), the majority opinion lays stress upon the fact that defendant's combination and boycott were intended "to deprive the public at large of advantages to be derived from the use of" a labor-saving invention. On the other hand the minority opinion asserts that the defendants had not exceeded the lawful limits of competition; that "products of labor-saving machinery are no more exempt from competition than hand-made products." *Huskie v. Griffin*, 75 N. H. 345, 74 At. 595, 27 L. R. A., N. S. 966, 139 Am. St. R. 718 (1909).

9. 167 Mass. 92, 44 N. E. 1077, 57 Am. St. R. 443, 35 L. R. A. 722 (1896; cf. the references to *Allen v. Flood*, in the Lord Chancellor's Opinion in *Quinn v. Leathem* (1901), A. C. 495.

10. *Ertz v. Produce Exchange*, 79 Minn. 140, 48 L. R. A. 90, 81 N. W. 737 (1900), distinguishing *Bohn*

either by employers^{10a} or by employees,^{10b} its conduct will be deemed unjustifiable. In Massachusetts, it has been held that a strike to procure the removal of a foreman, because some of the employees disliked him, is not for a legal purpose;^{10c} and whether any strike is justifiable is, in that State, a question of law, to be decided by the court.^{10d} Unlawful combinations will be discussed further under conspiracy.^{10e}

78. Malicious Exercise of a Legal Right. The use of the term "malicious," in connection with conduct, such as we have been considering, has proved to be a source of confusion, and many judges and text-writers are discarding it for less ambiguous terms, such as "unlawful," "wrongful," "bad faith."¹¹ It is still employed by some authorities, who insist that the motive with which an act is done is determinative of its tortious character.^{11a} The prevailing view, however, is that the actionability of a person's conduct does not depend upon whether his motive is malicious or

Manufacturing Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. R. 319 (1893); Martens v. Reilly, 109 Wis. 464, 84 N. W. 840 (1901); Transportation Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591 (1901); Am. Fed. of Labor v. Buck's Stove & Range Co., 33 App. D. C. 83, 32 L. R. A., N. S. 748, and note (1909); Loewe v. California State Fed. of Labor, 139 Fed. 71 (1905).

10a. McCord v. Thompson-Starrrett Co., 198 N. Y. 587; 92 N. E. 1090 (1910), aff'g 129 App. Div. 130, 113 N. Y. Supp. 385 (1908).

10b. Folsom v. Lewis, 208 Mass. 336, 94 N. E. 316, 35 L. R. A., N. S. 787, with note (1911).

10c. De Minico v. Craig, 207 Mass. 593, 94 N. E. 317 (1911).

10d. Minasian v. Osborne, 210 Mass. 250, 96 N. E. 1036, 37 L. R. A., N. S. 179, with note, 24 Ann. Cas. 1299, with valuable note (1911).

10e. *Infra*, chap. IX, § 4.

11. See Allen v. Flood (1898), A. C. 1; Pollock, Torts (6th Ed.), 272; Macauley v. Tierney, 19 R. I. 255, 33 At. 1, 37 L. R. A. 455, 61 Am. St. R. 770 (1895); cases digested in note to Minasian v. Osborne, 24 Ann. Cas. 1302-1306; 20 Harv. L. Rev. 253, 345, 429; Interference with Trade, by Mr. Basak, 27 Law Quar. Rev. 290, 399, 28 Ibid. 52 (1911).

11a. Norton v. Randolph, — Ala. —, 58 So. 283, 40 L. R. A., N. S. 129 (1912), and note thereon in 12 Col. L. Rev. 633; Globe, etc. Ins. Co. v. Firemen's F. Ins. Co., 97 Miss. 148, 52 So. 454, 29 L. R. A., N. S. 869 (1910); Wesley v. Nat. Lumber Co., 97 Miss. 814, 53 So. 346, 25 Ann. Cas. 796, with note (1910); Barger v. Barringer, 151 N. C. 433, 66 S. E. 439, 25 L. R. A., N. S. 831, 19 Ann. Cas. 472 (1909); Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946, 22 L. R. A., N. S. 599, with note, 16 Ann. Cas. 807 (1909). Cf. Buck v. Latham, 110 Minn. 523, 126 N. W. 278 (1910).

beneficent, but upon whether his conduct inflicts legal harm upon the plaintiff.^{11b} "The general rule is that whatever a man may lawfully do under any circumstances, he may do regardless of the motive for his conduct."^{11c} "Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due. A wrongful act, done knowingly and with a view to its injurious consequences, may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law:"^{11d}

§ 8. ASSENT OF PLAINTIFF.

79. Contract Exemption from Tort Liability. If the essence of a tort is the unlawful violation of a person's right created by the law, it must follow that an act or omission of A, to which B has consented, is not tortious towards B, unless the consent is of a kind that the law will not countenance. As a rule, the law does not force a person to stand upon his rights. It permits him to waive, release or sell them. Accordingly, by a contract freely and fairly made, he may limit his right of recovery,¹² for what would otherwise be an actionable tort, or he may forego that right altogether.¹³

11b. *Arnold v. Moffitt*, 30 R. I. 310, A. 305, 81 Am. St. R. 841 (1900), a 75 At. 502 (1910); *South Royalton split fence case*.

Bank v. Suffolk Bank, 27 Vt. 505 **11d.** Lord Watson in *Allen v. Flood* (1898), A. C. 1, at p. 92.

332, 124 N. W. 293, 30 L. R. A., N. S. **12.** *Alair v. Northern Pac. Ry.*, 53 495 (1910); *Lancaster v. Hamburger*, 70 Ohio St. 156, 71 N. E. 289, 65 763, 39 Am. St. R. 588 (1893); L. R. A. 856 (1904). Defendant reported a railroad conductor for misconduct and this caused his discharge. Defendant's motive was *O'Malley v. Great Northern Ry.*, 86 Minn. 380, 90 N. W. 974 (1902); *Jacobs v. Central Ry. of N. J.*, 208 Pa. 535, 57 At. 982 (1904).

held to be immaterial. *Rader v. Davis*, Ia. , 134 N. W. 849 **13.** *Hartford Fire Ins. Co. v. Chicago, Mil. & St. P. Ry.*, 175 U. S. 91, 20 Sup. Ct. 33 (1899), aff'g S. C. in

11c. *Metzger v. Hochrein*, 107 70 Fed. 201, 17 C. C. A. 62, 30 L. R. Wis. 267, 270, 83 N. W. 308, 50 L. R. A. 193, 62 Fed. 904, 36 U. S. App.

This doctrine has been modified in some jurisdictions by statutes, which invalidate contracts by common carriers,¹⁴ or by certain classes of employers,¹⁵ made with a view of exempting them from liability for negligence or other torts.

80. Invalid in Some Cases at Common Law. Even in the absence of a statute, many courts have held that contract "exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy,"¹⁶ and "invalid for the reason that they tend to promote negligence on the part of corporations in respect to the personal safety of their employees"¹⁷ and passengers.¹⁸ Some of these courts, however, permit common carriers to exempt themselves from tort liability by contracts with other corporations, such as express companies.

152; *Griswold v. Illinois Cen. Ry.*, 90 Ia. 265, 24 L. R. A. 647, 57 N. W. 843 (1894).

14. *Norfolk & Wes. Ry. v. Tanner*, 100 Va. 379, 41 S. E. 721 (1902); *Postal Tel. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119 (1901).

15. Rev. Laws, Mass., Ch. 106, § 16, and other statutes cited in Dresser, *Employers' Liability Acts*, pp. 149-151. Also the Federal Employers' Liability Act of 1908, applied in *Second Employers' Liability Cases*, 223 U. S. 152, 32 Sup. Ct. 169 (1912); *Phila., Balt. & Wash. Ry. v. Schubert*, 224 U. S. 603, 32 Sup. Ct. 589 (1912), "where Congress possesses power to impose a liability, it also possesses power to insure its efficiency by prohibiting any contract, rule, regulation or device in evasion of it."

16. *The Kensington*, 183 U. S. 263, 268, 22 Sup. Ct. 102 (1902), and cases therein cited; *Pugmire v. Oregon Short Line*, 33 Utah 27, 92 Pac. 762, 14 Ann. Cas. 384, 13 L. R. A., N. S. 565 (1907).

17. *Tarbell v. Rutland Ry.*, 73 Vt. 347, 51 At. 6 (1901); *Johnston v. Fargo*, 184 N. Y. 379, 77 N. E. 388, 6 Ann. Cas. 1, 7 L. R. A., N. S. 537 (1906). "The employer and the employed, in theory, deal upon equal terms; but practically that is not always the case. The artisan or workman may be driven by need, or he may be ignorant, or of improvident character. It is therefore for the interest of the community that there should be no encouragement for any relaxation on the employer's part in his duty of reasonable care for the safety of his employee. That freedom of contract may be said to be affected by the denial of the right to make such agreements is met by the answer that the restriction is but a salutary one, which organized society exacts for the surer protection of its members."

18. *Railroad Company v. Lockwood*, 17 Wall. (U. S.) 357 (1873); *Carroll v. Missouri Ry.*, 88 Mo. 234, 57 Am. R. 382, with valuable note, pp. 388-398 (1885).

In cases of this kind the contracting parties are deemed to stand on a footing of equality, and the consent of the express company is entirely voluntary. No rule of public policy, therefore, it is said, requires a court to invalidate the contract.¹⁹ The same doctrine has been applied to contracts between circus proprietors and railroad companies for the transportation of circus property and employees.²⁰ In short, contract exemptions of common carriers are generally upheld unless these "amount to a denial or repudiation of duties which are of the very essence of their employment."²¹ Hence, when a common carrier becomes a private carrier or bailee, and undertakes a service which is not imposed upon it as "a public or a quasi-public duty, such as that owing by a common carrier to an ordinary shipper, passenger or servant,"²² but which it is at liberty to undertake or to decline, and with respect to which the bailor or patron is at no disadvantage in bargaining, the carrier is allowed to contract for exemption from tort liability.²³

The same doctrine has been applied to cases brought by express messengers against common carriers, where the express company has exempted the carrier from liability for negligence. The messenger is not treated as a passenger, and as to him the defendant is a private carrier.^{23a}

81. Free Pass: Conflicting Views. Whether a common carrier may exempt itself from such liability to a passenger riding on a free pass, is a question upon which courts differ. In England, and in some of our jurisdictions, it has received an affirmative

19. *Baltimore and Ohio S. W. Ry. Mass.* 535, 31 N. E. 650 (1892); *Coup v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560 (1899), distinguishing *New York Cent. Ry. v. Lockwood*, 17 Wall. 357 (1873), and citing *Bates v. Old Colony Ry.*, 147 Mass. 255, 17 N. E. 633 (1888); *Griswold v. N. Y. & N. E. Ry.*, 53 Conn. 371, 4 At. 261 (1885); *Pittsburg, C. & St. L. Ry. v. Mahoney*, 148 Ind. 196, 40 L. R. A. 101, 47 N. E. 464, 62 Am. St. R. 503 (1897); *Poucher v. N. Y. C. Ry.*, 49 N. Y. 263, 10 Am. R. 364 (1872).

20. *Robertson v. Old Col. Ry.*, 156

21. *Louisville Railway Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869 (1890).

22. *Pittsburg, C., C. & C. Ry. v. Mahoney*, 148 Ind. 196, *supra*.

23. *Russell v. Pittsburgh & C. Ry.*, 157 Ind. 305, 61 N. E. 678, 87 Am. St. R. 214, 55 L. R. A. 253 (1901); a well-reasoned decision citing many authorities.

23a. *Perry v. Phila., B. & W. Ry.*, 77 At. 725 (Del. 1910), and cases digested in the opinion.

answer. Courts, holding this view, declare that such person is not "in the position of one who at common law, was entitled to the rights of a passenger, and became so entitled because of the obligation of the carrier to perform the duties resting upon it by virtue of the public nature of its employment;" and, therefore, "there is no principle of public policy" prohibiting him and the carrier from making a valid contract of exemption.²⁴

On the other hand, courts which answer the question in the negative declare: "The ground upon which such agreements are held to be invalid is that they violate public policy. Is the State solicitous only for the safety of those who pay their fare? How does the fact that the passenger is being transported for hire, or as a mere gratuity, interest or affect the State? The policy of the State is to enforce, with an equal hand, the performance of those duties upon which the safety of her citizens depends."²⁵

82. Contract Implied from Accepting Benefits. In the absence of a valid statute on the subject,^{25a} a person who has been injured by the negligence of another may absolve the latter from liability by an implied contract, as well as by an express one. He does this, when having the option to sue for negligence or to accept the benefits of relief funds provided by the defendant for its injured employees, he accepts the benefits.^{25b} In such case, "the injured party is not stipulating for the future, but settling for the past; he is not agreeing to exempt the defendant from liability for negligence, but accepting compensation for an injury already caused thereby."^{25c}

24. *Duncan v. Maine Cent. Ry.*, Cal. 769, 116 Pac. 51, 37 L. R. A., N. 113 Fed. 508 (1902). Those who accept gratuities and acts of hospital-

ity are bound by the conditions on which they are granted, at p. 514. Quoted with approval in *Boering v. Chesapeake B. Ry.*, 193 U. S. 442, 451, 24 Sup. Ct. 515 (1904), following *Nor. Pac. Ry. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408 (1904); *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261, 29 At. 1069 (1894).

25a. *Chicago, B. & Q. Ry. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259 (1910), aff'g 131 Ia. 340, 108 N. W. 902, 33 L. R. A., N. S. 706 (1906), upholding the statute.

25b. *Twaits v. Penn. Ry.*, 77 N. J. Eq. 103, 75 At. 1010 (1910); *Collazzi v. Penn. Ry.*, 143 App. Div. 638, 128 N. Y. Supp. 312 (1911), and cases cited therein.

25c. *Johnson v. Phila. & R. Ry.*, 163 Pa. 127, 29 At. 854 (1894). See *Walther v. Southern Pac. Co.*, 159

83. **Leave and License by Plaintiff.** Thus far we have been considering cases where the plaintiff's exoneration of the defendant has taken the form of a contract. It is not necessary, however, that it should take this form. Most frequently it consists in an agreement without consideration, commonly characterized as "leave and license," or of conduct which falls under the maxim *volenti non fit injuria*, or the phrase "assumption of risk."

A physician, who forcibly or fraudulently makes an examination of another's person without his consent or other lawful authority, commits an aggravated assault.²⁶ If, however, the examination is assented to, though the assent be reluctant, he will be exempt from tort liability.²⁷ Persons, taking part in lawful sports, assent to the harsh treatment which they had good reason to believe would be accorded them in such play, but to nothing more than this.²⁸ Nor does one assent to being made the victim of a college rush by becoming a student of the college, or a spectator of the rush.²⁹ Moreover, plaintiff's assent will not exonerate the defendant from tort liability, if the acts assented to are such as the law will not countenance. Hence "one may recover in an action for assault and battery, although he agreed to fight with his adversary; for such an agreement to break the peace being void, the maxim *volenti non fit injuria* does not apply."³⁰ An assent to a form of initia-

26. *Reg. v. Flattery*, 2 Q. B. D. 16 (1747); *Barholt v. Wright*, 45 410 (1877); *Agnew v. Johnson*, 13 Ohio St. 177 (1887), citing *Stout v. Cox* C. C. 625 (1877). *Wren*, 1 Hawks (8 N. C.) 420 (1821);

27. *Latter v. Braddell*, 50 L. J. Q. B. 166, 44 L. T. 369, 29 W. R. 366 (1880). *Adams v. Waggoner*, 33 Ind. 531 (1870); *Shay v. Thompson*, 59 Wis. 540 (1883); *Logan v. Austin*, 1 Stewart (Ala.) 476 (1828); *Comm. v. Colberg*, 119 Mass. 350 (1876); *McNeill v. Mullin*, 70 Kan. 634, 79 Pac. 168 (1905). It is immaterial in such a

28. *Fitzgerald v. Cavin*, 110 Mass. 153 (1872); *Peterson v. Haffner*, 59 Ind. 130, 26 Am. R. 81 (1877). case who commits the first act of

29. *Markley v. Whitman*, 95 Mich. 236, 54 N. W. 763, 35 Am. St. R. 558, 20 L. R. A. 55 (1893), cf. *Reid v. Mitchell*, 12 R. (Sessions Cases, Fourth Series), 1129 (1885), and *Reynolds v. Pierson*, 29 Ind. App. 273, 64 N. E. 484 (1902). violence; *Morris v. Miller*, 83 Neb. 218, 119 N. W. 458, 20 L. R. A., N. S. 907 (1909); contra, *Bishop, Non-contract Law*, § 196, approved and followed in *Goldnamer v. O'Brien*,

30. *Bell v. Hansley*, 3 Jones (48 N. C.) 131 (1855), citing and following *Boulter v. Clark*, Buller's N. P. 98 Ky. 569, 33 S. W. 831, 56 Am. St. R. 378, 36 L. R. A. 715 (1896).

tion³¹ into a society or of expulsion therefrom,³² which subjects the victim to "appreciable bodily harm for the mere pleasure"³³ of the participants, has been held invalid.

84. Deception of Plaintiff. If the plaintiff's assent is secured by fraud or deception on the part of defendant the assent is vitiated by the fraud, and will not avail as a defense;³⁴ unless the deceit practised relates to something of such an illegal or clearly immoral character, that the law raises no duty of disclosure on the part of the deceiver.³⁵

In the last cited case, the plaintiff sued the defendant for assault upon her person. Upon the trial, it appeared that, for about two years illicit intercourse subsisted between the parties and, during its continuance the defendant infected plaintiff with venereal disease. The trial judge charged the jury that "If the defendant, knowing he had venereal disease, and that the probable and natural effect of his having connection with the plaintiff would be to communicate to her venereal disease, fraudulently concealed from her his condition, in order to induce, and did thereby induce her to have connection with him; and if but for the fraud she would not have consented to have such connection, he had committed an assault, and one for which they might, on the evidence, award substantial damages." This charge was held by the appellate tribunals to be erroneous. "In the present case," said Lord Chancellor Ball, "the fraud relied upon to annul the plaintiff's consent, is the concealment of a fact which if known would have induced her to with-

31. *Kniver v. Phoenix Lodge*, 7 Chic. Leg. News, 213 (1905); *Mohr v. Williams*, 95 Minn. 261, 104 N. W. Ont. (Q. B.) 377 (1885).

32. *State v. Webster*, 75 N. C. 134 (1876). 12, 1 L. R. A., N. S. 439, with note, 5 Ann. Cas. 303, and note (1905).

33. *Pollock on Torts* (9th Ed.), 164. patient's consent to the particular operation will be presumed when he

34. *Reg. v. Flattery*, 2 Q. B. D. 410 (1877); *Comm. v. Stratton*, 114 Mass. 303; 19 Am. R. 350 (1873); *McCue v. Klein*, 60 Tex. 168, 48 Am. R. 260 (1883). A surgical operation has been held actionable assault and battery, where performed without the express or implied consent of the patient, obtained in good faith. *Use of Janney v. Housekeeper and Gifford*, 70 Md. 162, 16 At. 382, 2. L. R. A. 587, 14 Am. St. R. 340 (1888); *Bennan v. Passonnet*, ... N. J. L. ..., 83 At. 948 (1912).

35. *Hegarty v. Shine*, L. R. 4 Irish, 288 (1878).

Pratt v. Davis, 118 Ill. App. 161, 37

hold it: but before this effect is attributed to such concealment, it seems to me reasonable to demand—what is required in contract—that from the relation between the parties there should have arisen a duty to disclose, capable of being legally enforced. And how can this be, when the relation is itself immoral and for the indulgence of immorality: the supposed duty with the object of aiding its continuance? To support obligation founded upon relation, it appears to me the relation must be one that we can recognize and sanction. The consequence of an immoral act—the direct consequence—is the subject of the complaint. Courts of justice no more exist to provide a remedy for the consequences of immoral or illegal acts and contracts, than to aid or enforce those acts or contracts themselves.”³⁶

85. **Volenti Non Fit Injuria.** The maxim *volenti non fit injuria* seems to be peculiarly applicable to cases, where the plaintiff, not having expressly consented to defendant's exemption from tort liability, has sustained harm by voluntarily encountering a source of danger due to the conduct of another. It is effective as a defense on the ground that, in the circumstances of a given case, the defendant's conduct is not the violation of a legal duty to the plaintiff. A land owner sets spring-guns,³⁷ or discharges fire-arms into the air,³⁸ to frighten off trespassers. Towards them his duty is only to abstain from inflicting willful or wanton injury. A person, who, with knowledge of the land owner's habits, voluntarily enters upon the premises thus protected, and sustains harm from the known source of danger, has only himself to blame. The consequences are only those which he courted. In his situation, the land owner owed

36. *Hamilton v. Lomax*, 26 Barb. (N. Y.) 615 (1858), accord.

37. *Ilott v. Wilkes*, 3 B. & Ald. 304, 22 R. R. 400 (1820); *State v. Barr*, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. R. 890, 29 L. R. A. 154, with note (1895).

38. *Magar v. Hammond*, 171 N. Y. 377, 64 N. E. 150, 59 L. R. A. 315 (1902). The Court of Appeals declared that if the defendants were free from “willfulness, malice, intention to injure, or desire or motive to do so, they were entitled to have the jury instructed that, if the plaintiff voluntarily exposed himself to a known danger, he could not recover for the act of the watchman in shooting, though this act, in the defense of the master's property was without due care.” This case was again before the Court of Appeals in 183 N. Y. 387, 76 N. E. 474, 3 L. R. A., N. S. 1038, with case note (1906).

him no duty of care which has been violated. The injury is legally chargeable to his own act, and not to that of the land owner.

The principle underlying the foregoing and similar cases has been stated as follows: "One who, knowing and apprehending a danger, voluntarily assumes the risk of it, has no just cause of a complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to such chances as exist in the situation, without right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger. If there is a failure to do his duty according to a high standard of ethics, there is, as between the parties, no neglect of legal duty."³⁹ A briefer statement is found in a modern English decision: "The duty of an occupier of premises, which have an element of danger upon them, reaches its vanishing point in the case of those who are cognizant of the full extent of the danger and voluntarily run the risk."⁴⁰

86. Limitations upon Maxim. It is apparent from these statements of the principle, that it is subject to various limitations. First the defendant is bound to show that the plaintiff knew and apprehended the danger in question. If it is not clearly apparent, notice of the danger must be given, and this notice must be brought home to the plaintiff.⁴¹ Whether the plaintiff has been thus noti-

³⁹ *O'Maley v. Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161, with valuable note (1893). Quoted with approval in *Drake v. Auburn City Ry.*, 173 N. Y. 466, 66 N. E. 121 (1903).

⁴⁰ *Bowen, L. J.*, in *Thomas v. Quartermaine*, 18 Q. B. D. 685, 56 L. J. Q. B. 340 (1887).

⁴¹ *Bird v. Holbrook*, 4 Bing. 628, 29 R. R. 657 (1828). Plaintiff, though a trespasser, had no notice of spring guns on defendant's land, and recovered damages: *Sarch v. Blackburn*, 4 C. & P. 297 (1830). Defendant had posted a notice in large letters, "Beware of dog;" but plaintiff could not read, and entered defendant's premises in ignorance of the danger: *Dowd v. N. Y. O. & W. Ry.*, 170 N. Y. 459, 63 N. E. 541 (1902), holding that it is no part of the plaintiff's case to show that he did not assume the risk, but that the burden of showing such assumption is on the defendant: *Cf. Choctaw, etc. Ry. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24 (1903). Upon this question the true test is not in the exercise of care to discover danger, but whether the defect is known or plainly observable by the employee: *Texas, etc. R. Co. v. Archibald*, 170 U. S. 665, 42 L. Ed. 1188, 18 Sup. Ct. 777 (1898).

fied, or has in truth known and apprehended the danger, is a question of fact, and, usually for the jury;⁴² although when the evidence is not conflicting and warrants but one inference, the question may be disposed of by the court.⁴³

87. Positive Duty Imposed by Law. Another limitation upon the principle appears in cases, where the common law or a statute imposes upon the defendant a positive duty not to cause or permit the danger in question. If a person creates or maintains a nuisance, he is liable for all the direct consequences thereof:⁴⁴ and cannot be heard to say that one who has been subjected to a risk by such nuisance has voluntarily courted it, and thus has absolved him from tort liability. For example, defendant unlawfully dug a trench along the driveway from plaintiff's livery-stable to the street, making it dangerous for plaintiff to take his horses out. The latter attempted to lead one of his horses along the dangerous path, when it fell over the rubbish, thrown up by defendant, and into the trench and was killed. The court charged the jury "that it could not be the plaintiff's duty to refrain altogether from coming out of the stable merely because the defendant had made the passage in some degree dangerous: that the defendant was not entitled to keep the occupier of the stable in a state of siege until the passage was declared safe, first creating a nuisance and then excusing him-

42. *Osborne v. London & N. W. Ry.*, 21 Q. B. D. 220 (1888); *Fitzgerald v. Conn. River Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. R. 537 (1891).

43. *Juchatz v. Michigan Alkali Co.*, 120 Mich. 654, 79 N. W. 907 (1899); *Howey v. Fisher*, 122 Mich. 43, 80 N. W. 1004 (1899); *Roberts v. Missouri, Etc. Co.*, 166 Mo. 370, 66 S. W. 155 (1901); *Ball v. Hanser*, 129 Mich. 397, 89 N. W. 49 (1902); *Martin v. Chicago, Etc. Ry.*, 118 Iowa, 148, 91 N. W. 1034 (1902); *George Fowler Sons & Co. v. Brook*, 65 Kan. 861, 70 Pac. 600 (1902); *Drake v. Auburn City Ry.*, 173 N. Y. 466, 66 N. E. 121 (1903).

44. *Muller v. McKesson*, 73 N. Y. 195 (1878); *Missouri, Etc. Ry. v. Burt* (Tex. Civ. App.), 27 S. W. 948 (1894); *Davis v. Rich*, 180 Mass. 285, 62 N. E. 375 (1902); *Kleebauer v. Western Fuse Co.*, 138 Cal. 497, 69 Pac. 246, 71 Pac. 617, 60 L. R. A. 377 (1902). In the last cited case the court approved the rule laid down in *Kinney v. Koopman*, 116 Ala. 310, 22 So. 593, 67 Am. St. R. 119, with note (1896), and *Tuchinsky v. Lehigh, Etc. Co.*, 199 Pa. 515, 49 At. 308 (1901), holding that whether a storehouse of gunpowder or of dynamite is a nuisance, is a question for the court, where the facts are undisputed.

self by giving notice that there was some danger; though, if the plaintiff had persisted in running upon a great and obvious danger, his action could not be maintained.”⁴⁵

Again, defendant, a manufacturer, permitted the steps leading from his mill to the street, to become coated with ice. Plaintiff, an employee, in going from her work, fell on the icy steps and was injured. It was the duty of the defendant to provide a reasonably safe passage way for plaintiff, and he was not absolved from this duty by plaintiff's attempt to go down these icy steps, such being her only way of leaving the mill.⁴⁶

88. Spectators at Unlawful Exhibitions. It is submitted that the foregoing doctrine should have been applied in *Scanlon v. Wedger*⁴⁷ and *Frost v. Josselyn*.⁴⁸ The defendants, in those cases,

45. *Clayards v. Dethick*, 12 Q. B. 439 (1848). The last clause of the instruction is sustained in *Kriwinski v. Penn. Ry. Co.*, 65 N. J. L. 392, 47 At. 447 (1900); cf. *Lax v. Corporation of Darlington*, 5 Ex. D. 28, 49 L. J. Ex. 105 (1879); *Osborne v. London, Etc. Ry.*, 21 Q. B. D. 220, 57 L. J. Q. B. 618 (1888); *Yarmouth v. France*, 19 Q. B. D. 647, 57 L. J. Q. B. 7 (1887). In the last two cases it is said that the plaintiff is not precluded from recovering by the fact that he knew there was some danger. In order to bar a recovery the defendant must show that “the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.”

46. *Fitzgerald v. Connecticut River Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. R. 537 (1891). The court laid much stress upon the fact that it was not shown that plaintiff knew and appreciated the extent of the danger, to which defendant's misconduct subjected her, as the English court did in the cases cited in the last preceding note.

47. *Amidon*, 72 N. H. 361, 56 At. 548 (1902). In *Jellow v. Fore River Shipbuilding Co.*, 201 Mass. 464, 87 N. E. 906 (1909), the court said: “It should not be overlooked where the use of the terms ‘risk’ and ‘acceptance of the risk’ are involved, that the true question is whether, in incurring the particular danger, the plaintiff accepts the risk in the sense that by continuing at his work he agrees to relieve the defendant from the possible results. The plaintiff consequently not only must be shown to have known of the risk, but by implication from his conduct must be found to have voluntarily assumed it.”

48. 156 Mass. 462, 31 N. E. 642, 16 L. R. A. 395 (1892).

49. 180 Mass. 389, 62 N. E. 469 (1902). Followed in *Johnson v. City of New York*, 186 N. Y. 139, 78 N. E. 715 (1906); *Bogart v. City of New York*, 200 N. Y. 379, 93 N. E. 937 (1911), voluntary spectators at automobile races, which were conducted illegally, were held to have assumed the risk of defendant's illegal acts.

discharged fire-works in public highways without a lawful license. The plaintiffs, while lawfully upon the highway as spectators, and in the exercise of due care, were injured by the fire-works. There was no evidence of negligence on the part of defendants. It was held by a divided court, in the former case (and this decision was followed in the latter), that "the plaintiffs were content to abide the chance of personal injury not caused by negligence;" that "a voluntary spectator, who is present merely for the purpose of witnessing the display, must be held to consent to it, and he suffers no legal wrong, if accidentally injured without negligence on the part of any one, although the show was unauthorized."⁴⁹ In the minority opinion, Morton, J., said: "It is carrying the doctrine of assumption of risk further than I think it has ever been carried to say that one who, being lawfully on the highway, and in the exercise of due care, observes as a spectator an unlawful and dangerous exhibition in it, assumes the risk. The exhibitor is bound at his peril to see that he has a valid license. If he selects the highway for an unlawful and dangerous display designed or calculated to attract the public, he, and not the spectator, assumes the risk of injury. It is of no consequence that the defendant exercised reasonable care in firing the bomb. It is a contradiction of terms to say of one engaged in an unlawful, dangerous, wrongful and unjustifiable business that he used due care in it. Due care is predi-

⁴⁹ Pollock on Torts (1st Ed.), 115. The latter recovered as compensatory damages \$375. Lyon, C. view. But the learned author's J., said: "It was unlawful for the statements are predicated upon law- defendant to be armed with a revol- ful conduct on the part of the de- ver when the plaintiff was injured, fendant. In the sixth edition, at and hence he is liable for any in- page 497 (9th Ed., p. 530), it is said jury inflicted by him with such that voluntary exposure to danger weapon. It is immaterial that the will not excuse the breach of a posi- plaintiff was consenting to the de- tive statutory duty. This doctrine fendant being so armed, and to his has been applied frequently by use of the revolver. The question American courts in fire-escape of negligence (on defendant's part) cases. See Carrigan v. Stilwell, 97 is immaterial." Followed in Horton Me. 247, 54 At. 389. 61 L. R. A. 163 v. Wylie, 115 Wis. 505, 92 N. W. 245 (1903), and authorities there cited. (1902); Osborne v. Vandyke, 113 Ia. In Evans v. Walte, 83 Wis. 286, 53 557, 85 N. W. 784, 54 L. R. A. 367 N. W. 445 (1892), defendant, a minor, (1901); accord. Gilmore v. Fuller, armed with a revolver, in violation 198 Ill. 130, 65 N. E. 84 (1902), of a statute, accidentally shot plain- contra.

cated of something which a person may lawfully do, but which, by his negligent manner of doing it, may become injurious to others; not of something which he has no right to do."

89. Assumption of Risk as an Absolvent from Statutory Duty. In England it is well settled that a defendant is not absolved from a positive statutory duty by plaintiff's assumption of the risk: and, unless the latter's conduct is altogether unreasonable, in taking the risk thus unlawfully thrust upon him by the defendant, he is entitled to recover.⁵⁰ The English rule has been stated as follows:^{50a} "Where the master is under a statutory liability to take precautions in any particular work, the presumption of law is that as between the master and the workman, the fact of the workman working in the absence of the statutory safeguards does not discharge the master from his liability; * * * and this presumption can only be rebutted by proof of an undertaking of the employment by the workman with a knowledge of the risk involved, and of the master's duty in respect thereof."^{50b} * * * The workman is prohibited from definitely contracting to undertake risks, when a penalty is imposed for doing or omitting the act which is the subject of legislation." In this country, the decisions are conflicting, but the weight of authority is opposed to the English view.⁵¹ Since the publication of the first edition of

50. *Clarke v. Holmes*, 7 H. & N. 937, 31 L. J. Ex. 356 (1862); *Baddeley Co. v. Earl of Granville*, 19 Q. B. D. 423, 56 L. J. Q. B. 501 (1887); *Butler v. Walton*, 105 Tenn. 415 (1900); *Davis Fife Canal Co.* (1912), A. C. 149, 81 L. J. P. C. 97; *Clerk & Lindsell on Torts* (2d Ed.), 441-446; *Pollock on Torts* (9th Ed.), 530. *Love v. American Manufacturing Co.*, 160 Mo. 608, 61 S. W. 678 (1900); *Chattanooga Rapid Transit Co. v. Polland*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. R. 319 (1901); *Troxler v. Southern Ry.*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 315, 70 Am. S. R. 580 (1899); *Elmore v. Seaboard Ry.*, 132 N. C. 865, 44 S. E. 620 (1903); *Evans v. Walte*, 83 Wis. 286, 53 N. W. 465 (1892). *Contra*, *Birmingham Electric Co. v. Allen*, 99 Al. 359, 13 So. 8, 20 L. R. A. 457 (1892); *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 63 L. R. A. 551 (1903); *Glenmont Lumber Co. v. Roy*, 126 Fed. 524 (1903); but see *Co.*, 101 Ky. 339, 41 S. W. 10 (1897); dissenting opinion by Thayer, J., in

50a. *Beven on Negligence* (3d Ed.), 645-646.

50b. *Tyrrell v. E. E. Cain & Co.*, 128 N. W. 536 (Ia. 1910).

51. In accord with the English cases are *Narremore v. Cleveland & C. Ry.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68 (1899); *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 55 N. E. 131 (1899); *Godfrey v. Coal Co.*, 101 Ky. 339, 41 S. W. 10 (1897);

Birmingham Electric Co. v. Allen, 99 Al. 359, 13 So. 8, 20 L. R. A. 457 (1892); *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 63 L. R. A. 551 (1903); *Glenmont Lumber Co. v. Roy*, 126 Fed. 524 (1903); but see dissenting opinion by Thayer, J., in

this work, the tide of judicial decision has changed, and is now running strongly in accord with the English authorities.^{51a}

90. Assumption of Risk a Term of Servant's Contract. Most of the American cases, in which this question has been considered, have arisen between employee and employer, and the discussion has been further complicated by a difference of opinion concerning the basis of the assumption of risk by the employee. On the one hand, it is said, that "assumption of risk is a term of the contract of employment, by which the servant agrees that danger of injury, obviously incident to the discharge of his duty, shall be at his risk * * * and the only question is whether the courts, will enforce or recognize as against a servant an agreement, express or implied on his part, to waive the performance of a statutory duty of the master, imposed for the protection of the servant and in the interest of the public. We think they will not."⁵²

91. Assumption of Risk versus Public Policy. Other courts declare that assumption of risk by the servant is not a term of his employment,^{52a} but has its origin in the legal relations of the parties, precisely as in the case of the land owner and an invited guest; that when a servant voluntarily assents to a known risk, no cause of action in his behalf arises against the statute violating

these two cases; *Martin v. Chicago, Nitrate Co. v. Bloom*, 76 Kan. 127, 90 Etc. Ry., 118 Ia. 148, 91 N. W. 1034 Pac. 821, 123 Am. St. R. 123 (1907); (1902); *Keenan v. Edison, Etc. Co.*, 159 Mass. 379, 34 N. E. 366 (1893); *Fitzwater v. Warren*, 206 N. Y. 355, 99 N. E. 1042 (1912), overruling *Anderson v. C. N. Nelson Lumber Co.*, 67 Minn. 79, 69 N. W. 630 (1896); *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367 (1896); *Wellston Coal Co. v. Smith*, 65 Ohio St. 71, 61 N. E. 143, 87 Am. St. R. 546, and note, p. 587 (1901); *Langlois v. Dunn Worsted Mills*, 25 R. I. 645, 57 At. 910 (1904); *Dressler, Employers' Liability*, § 116, and authorities cited.

51a. *Streeter v. Western W. S. Co.*, 254 Ill. 244, 98 N. E. 541 (1912); *Kleinfelt v. J. H. Somers Coal Co.*, 156 Mich. 473, 121 N. W. 118, 132 Am. St. R. 532 (1909); *Western Fur-*

niture Co. v. Bloom, 76 Kan. 127, 90 Pac. 821, 123 Am. St. R. 123 (1907); *Fitzwater v. Warren*, 206 N. Y. 355, 99 N. E. 1042 (1912), overruling *Knisley v. Pratt*, 148 N. Y. 372, in preceding note; *Amlano v. Jones & L. S. Co.*, 233 Pa. 523, 82 At. 780 (1912); 12 Columbia Law Rev. 733 (1912); *Labbatt on Master and Servant*, §§ 650-654.

52. *Narremore v. Cleveland, Etc. Ry.*, 96 Fed. 398, 37 C. C. A. 499, 48 L. R. A. 68 (1899); *Evans Laundry Co. v. Crawford*, 67 Neb. 153, 93 N. W. 177 (1903).

52a. *Denver & R. G. Ry. v. Norgate*, 141 Fed. 247, 72 C. C. A. 365, 5 Ann. Cas. 448, 6 L. R. A., N. S. 981 (1905).

employer and "hence there is none from which the contract exempts;" that "it is quite as obnoxious to public policy, independent of the penalty imposed, for the employee to aid and encourage the employer to violate it;"⁵³ that the statute "does not deprive laborers of their free agency and the right to manage their own affairs."⁵⁴ Even these courts admit that statutes may be so framed as to prevent any assumption of risk by employees; and such statutes have been enacted in several jurisdictions.⁵⁵

92. Distinguishable from Contributory Negligence. The conduct of the plaintiff which we have been considering under the various headings of leave and license, *volenti non fit injuria* and assumption of risk, is to be sharply distinguished from contributory negligence on his part. This distinction has not always been observed,⁵⁶ and no little confusion has resulted from the failure of judges in this respect. Under the statutes referred to in the last paragraph the distinction comes out very clearly.

A railroad employee does not assume the risk incident to the employer's violation of a statute, requiring grab-irons on all cars, where the statute expressly invalidates any contract or agreement, expressed or implied, to waive the benefit of the statute. But he

^{53.} *Martin v. Chicago, Etc. Ry.*, 118 Ia. 148, 91 N. W. 1034 (1902).

^{54.} *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367 (1896); overruled in *Fitzwater v. Warren*, 206 N. Y. 355, *supra*.

^{55.} *Coley v. North Car. Ry.*, 128 N. C. 534, 39 S. E. 43 (1901), applying ch. 56, Priv. Laws 1897, §§ 1 and 2. The latter section is as follows: "That any contract or agreement, expressed or implied, made by an employee of said company to waive the benefit of the aforesaid section shall be null and void." See other statutes referred to in *Dresser, Employers' Liability*, pp. 248, 249, 604.

^{56.} In *David v. New York, On., Etc. Ry.*, 170 N. Y. 459, 63 N. E. 541 (1902), Vann, J., says: "Nearly all courts recognize the doctrine of as-

sumed risks as resting upon implied contract, although in applying it they frequently refer to the result, without discussion, as contributory negligence." See 8 Harv. L. R. 457, "*Volenti non fit injuria*," by Charles Warren (1895); *Dresser, Employers' Liability*, §§ 84, 86 (1902). This distinction is fully discussed in *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 63 L. R. A. 551 (1903); and in *Schlemmer v. Buffalo, Etc. Ry.*, 220 U. S. 590, 597-599, 31 Sup. Ct. 561 (1910). By statute the defense of assumption of risk had been abolished, but this was held not to affect the defense of contributory negligence. Compare the opinion of Day, J., in this volume, with that of Holmes, J., in the same case, in 205 U. S. 1, 27 Sup. Ct. 407 (1907).

may be guilty of contributory negligence in taking hold of the drain pipes of an engine-tender, knowing that they were not put there to be used as grab-irons.⁵⁷ In that event, his contributory negligence will bar a recovery, as in other similar cases.^{57a}

Not a few of the cases often cited for the proposition that a defendant is absolved from the performance of a statutory duty, by the plaintiff's assumption of the risk, have decided only, that contributory negligence of the plaintiff may bar his action, although the defendant is guilty of a breach of statutory duty towards plaintiff.⁵⁸ Contributory negligence is established in such cases, by showing that the plaintiff recklessly exposed himself to manifest peril.^{58a}

§ 9. PLAINTIFF A WRONGDOER.

93. Not an Outlaw. We have seen that a person, who is injured while engaged in an illegal fight, may recover against his assailant, although he voluntarily assented to the assailant's conduct. This is not the result of unfair discrimination between the parties, but of various considerations of public policy.

94. Illegality of Conduct as a Bar to Recovery. In some instances, however, the illegality of the plaintiff's conduct, at the time of his injury, bars a recovery, but to have this effect, his illegal conduct must form a part of his cause of action, or must be a contributing cause of his injury. "While this principle is uni-

⁵⁷. *Coley v. North Car. Ry.*, 128 N. (1892); *Lowe v. Southern Ry.*, 85 C. 534, 39 S. E. 43 (1901). S. C. 363, 67 S. E. 460 (1910). In

^{57a}. *Lowe v. Southern Ry.*, 85 S. *Poll v. Numa Block Coal Co.*, 149 C. 363, 67 S. E. 460 (1910); *Dumphy* Ia. 104, 127 N. W. 1105, 33 L. R. A., v. N. Y. & N. H. Ry., 196 Mass. 471, N. S. 646 (1910), it is said: "The 82 N. E. 675, 13 L. R. A., N. S. 675 (1907). time for the work of repair to be

⁵⁸. *Victor Coal Co. v. Muir*, 20 Colo. 320, 38 Pac. 378, 46 Am. St. R. 299 (1894); *Godfrey v. Coal Co.*, 101 Ky. 339, 41 S. W. 10 (1897); *Queen* ably prudent person would expose v. *Dayton Coal Co.*, 95 Tenn. 458, 32 S. W. 460, 49 Am. St. R. 935 (1895). himself to it. Whether such conditions existed was a jury question."

^{58a}. *Mason v. Railroad Co.*, 111 Houston, Etc. Ry. v. *De Walt*, 96 N. C. 482, 494, 16 S. E. 701, 18 Tex. 121, 70 S. W. 531, 97 Am. St. R. L. R. A. 845, 32 Am. St. R. 814 877, with full note (1902).

versally recognized, there is a great practical difficulty in applying it. The best minds often differ upon the question whether in a given case, illegal conduct of a plaintiff was a direct and proximate cause contributing with others to his injury, or was a mere condition of it; or to state the question in another way, appropriate to the reason of the rule, whether or not his own illegal act is an essential of his case as disclosed by all the evidence.”⁵⁹

95. Difficulty in Applying the Principle. The practical difficulty referred to in the foregoing extract is aptly illustrated by two lines of Massachusetts decisions. As great a judge as Chief Justice Shaw ruled that the act of a plaintiff (injured by reason of a defect in a highway) in driving for pleasure on Sunday in violation of the statute, was “a species of fault on his part that concurred in causing the damage complained of.”⁶⁰ Justice Morton, approving this view, declared: “Whoever travels on the Lord’s day, except for necessity or charity, is acting in violation of the law. Such act of traveling itself is unlawful, and if, in the course and as an incident of such traveling, the traveler sustains an injury his unlawful act necessarily is a contributing cause of the injury.”⁶¹ In another line of cases, the same court has sustained recoveries by plaintiffs who were injured, while traveling in violation of the Sunday law, by an attacking dog,⁶² or negligent fellow-traveler.⁶³

96. Violation of Sunday Laws. The ruling of Chief Justice Shaw has not commended itself to judges outside of Massachusetts, and, in that State, it has been negatived by statute.⁶⁴ According to the prevailing view, a traveler in violation of the Sunday law is not a trespasser upon the highway. If he brings an action for injuries, caused by the defective street or bridge, “the

⁵⁹. *Newcomb v. Boston Protective* 134 Mass. 95 (1883).

Dep., 146 Mass. 596, 4 Am. St. R. 354, 16 N. E. 555 (1888).

⁶⁰. *Bosworth v. Inhabitants of the Public Statutes*, relating to the Swansey, 10 Met. (Mass.) 363 (1845).

⁶¹. *Lyons v. Desotelle*, 124 Mass. 387 (1878).

⁶². *White v. Lang*, 128 Mass. 598 (1880).

⁶³. *Wallace v. Merimack, Etc. Co.*, (1885).

⁶⁴. Gen. Laws, Mass., L. 1884, c. 37, § 1. “The provision of c. 98 of observance of the Lord’s Day shall not constitute a defense to an action for a tort or injury suffered by a person on that day.” *Read v. Bos. & A. Ry.*, 140 Mass. 199, 4 N. E. 227

fault which prevents a recovery is one which directly contributes to the accident: as carelessness in driving, either a vicious or unmanageable horse, or at an improper rate of speed, or without observation of the road, or in an insufficient vehicle, or with a defective harness, or in a state of intoxication, or under some other condition of driver, horse or carriage, which may be seen to have brought about the injury.”⁶⁵ If, in a given case, “the same causes would have produced the same result upon any other day, the fact that the accident occurred on Sunday is immaterial in considering the cause of it, or the question of contributory negligence;”⁶⁶ and plaintiff’s violation of the law is only a condition and not a cause of his harm.⁶⁷

97. **Illegal Conduct an Element in the Cause of Action.** On the other hand, if the plaintiff’s illegal conduct is an essential element of his case when all the facts appear, a court will not lend him its aid. His harm is not a legal injury. This is admirably illustrated by three cases tried at the same term in North Carolina. In the first of these,⁶⁸ it appeared that plaintiff, a soldier in the Confederate service, was injured in a railroad accident, while being carried by the defendant’s company to the field of hostile operations against the United States.

“If the rebellion had been successful,” said the court, “and a government had been founded upon that success, it would doubt-

⁶⁵ Danforth, J., in *Platz v. City land, Etc. Ry.*, 3 Ohio St. 172 (1854); of Cohoes, 89 N. Y. 219 (1882). *Mohney v. Cook*, 26 Pa. 342 (1855);

⁶⁶ Ill. Railroad Co. v. Dick, 91 Baldwin v. Barney, 12 R. I. 392, 34 Ky. 434, 15 S. W. 665 (1891), Am. R. 670 (1879); Eagan v. Ma-

⁶⁷ Phila., Etc. Ry. v. Phila., Etc. gulre, 21 R. I. 189, 42 At. 506 (1890); Towboat Co., 23 How. (U. S.) 209 Sutton v. Wanwatosia, 29 Wis. 21, 9 (1859); Black v. City of Lewiston, Am. R. 534 (1871); cf. Harrington v. 2 Idaho, 254, 13 Pac. 80 (1887); Los Angeles Ry., 140 Cal. 514, 74 Schmid v. Humphrey, 48 Ia. 652, 30 Pac. 15, 63 L. R. A. 238 (1903). A Am. R. 414 (1878); Bigelow v. Reed, bicycle rider injured while racing, 51 Me. 325 (1863); Sharp v. Evergreen Township, 67 Mich. 443, 35 N. Judgment for \$10,000, affirmed.

W. 67 (1887); Opsahl v. Judd, 30 ⁶⁸ Turner v. North Car. Ry., 63 Minn. 126, 14 N. W. 575 (1883); N. C. 522 (1869); Wallace v. Cannon, Woodman v. Hubbard, 5 Fost. (25 38 Ga. 199 (1868); accord, Flvas v. N. H.) 67 (1852); Carroll v. Staten Nicholls, 2 M., G. & S. 500, 52 Eng. Island Ry., 58 N. Y. 126, 17 Am. R. C. L. 501 (1846).

221 (1874); Kerwhacker v. Cleve-

less have been legitimate for the courts of such a government to adjust the rights of those who had been engaged in establishing it. But will the courts of the government which was attempted to be destroyed, interfere to redress one of the insurgents who was disabled in the very act of hostility to the government whose aid he now seeks? It will consult its dignity and not interfere in this dispute. The act of going to the field of operations was illegal, and the contract of the defendant to aid him by carrying him to the field was an illegal contract, and there can be no recovery."

In the second case,⁶⁹ growing out of the same accident, the defendant failed to show that the plaintiff was then going in order to take part in the confederate service, and he recovered a verdict of \$2,000. In the third case,⁷⁰ the plaintiff's "intestate was an officer of the Confederate States army at home on a furlough, and was killed by the negligence of officials of the defendant, while returning home from a visit to friends. Plaintiff recovered a verdict for \$3,000."

98. Duty Towards a Law Breaker. It is thus apparent that a law-breaker is not an outlaw. The fact that one has committed larceny gives no legal warrant to a mob to seize and threaten him with hanging.⁷¹ It "would work a confusion of relations and lend a very doubtful assistance to morality to allow an offender against the law, to the injury of another, to set off against the plaintiff that he too is a public offender."⁷² But the illegal conduct of the plaintiff, though not directly contributing to his injury in a particular case, may modify the defendant's duty towards him. A land owner has no right to treat a trespasser as an outlaw, and proceed to shoot,⁷³ or dynamite⁷⁴ or stone⁷⁵ him. On

⁶⁹. Ireland v. North Car. Ry., 63 N. C. 526n (1869).

⁷⁰. Clark v. Raleigh, Etc. Ry., 63 N. C. 526n (1869); accord, Gross v. Miller, 93 Ia. 72, 26 L. R. A. 605, 61 N. W. 385 (1894). It is no defense to an action for negligent shooting that, at the time of the injury, plaintiff and defendant were violating a statute prohibiting shooting on Sunday.

⁷¹. Stallings v. Owen, 51 Ill. 92 (1869).

⁷². Mohney v. Cook, 26 Pa. 342 (1855).

⁷³. Bird v. Holbrook, 4 Bing. 628, 29 R. R. 657 (1828).

⁷⁴. Carter v. Columbia, Etc. Ry., 19 S. C. 20 (1883).

⁷⁵. Connors v. Walsh, 131 N. Y. 590, 30 N. E. 59 (1892).

the other hand, he is not liable to such an one for mere negligence. The extent of his duty is to abstain from inflicting upon him willful or wanton injury.⁷⁶

99. Illegal Business Outside the Pale of the Law. While a law-breaker is not an outlaw, the business which he carries on, or the property which he owns may be outside the pale of the law. For example, the author of a copyrighted book, which is under the ban of the law as indecent or immoral, cannot maintain an action against one who pirates it, or otherwise interferes with its sale.⁷⁷ Nor can a person who, under the guise of conducting a drug store, carries on an illicit traffic in intoxicating liquors, be heard to complain that he has been forced to discontinue this illegal business and has lost the profits thereof, by reason of threats of the defendant, that if he did not discontinue it, he must take the consequences. To such a case the maxim applies *ex dolo malo non oritur actio*.⁷⁸ But it does not apply to property which the law recognizes as valuable for lawful use, although at the time it was converted or injured, the owner's use of it was unlawful.^{78a}

^{76.} Carter v. Columbia, Etc. Ry., 682, 47 S. E. 765, 67 L. R. A. 227 19 S. C. 20 (1883); Condran v. Chicago, Etc. Ry., 67 Fed. 522, 32 U. S. App. 182, 14 C. C. A. 506, 28 L. R. A. 749 (1895); Way v. Chicago, Etc. Ry., 64 Ia. 48, 19 N. W. 828 (1884); note (1907).

Bullard v. Mulligan, 69 Ia. 416, 29

N. W. 404 (1886); Purple v. Union Pac. Ry., 114 Fed. 123, 51 C. C. A. 564, and cases cited (1902). The

same principle has been applied in cases brought by persons injured through a carrier's negligence, while riding on a free pass, given in violation of a statute: McNeill v. Durham, Etc. Ry., 132 N. C. 510, 44

S. E. 34, 95 Am. St. R. 641 (1903); State v. Southern Ry., 122 N. C.

1052, 30 S. E. 133, 41 L. R. A. 246 (1898). The McNeill case was reversed upon a rehearing, 135 N. C.

^{77.} Lawrence v. Smith, Jacob, 471 (1822); Stockdale v. Onwhyn, 5 B. & C. 173, 7 D. & R. 625, 2 C. & P. 163

(1826). So, one who fraudulently mingles his chattels with those of another loses all legal right to them, and is remediless against him who appropriates the whole mass; Stephenson v. Little, 10 Mich. 434 (1862).

^{78.} Prude v. Sebastian, 107 La. 64, 31 So. 764 (1902).

^{78a.} Kreiter v. Nichols, 28 Mich. 496 (1874); Osborne v. State, 115 Tenn. 717, 92 S. W. 853, 5 Ann. Cas. 797 (1903).

100. Doctrine Misapplied. This maxim was misapplied, it is submitted, in a recent Illinois case.⁷⁹ Plaintiff was negligently shot by defendant while they with others were engaged in "a charivari of a young married couple." The transaction being an illegal one, the plaintiff's cause of action was held to be within the maxim. His unlawful act, in becoming a member of the party, was declared to concur in causing his damage, and thus to bar his recovery. Indeed, the court went so far as to assert that as plaintiff and defendant were members of a party engaged in breaking the law, the plaintiff was responsible for every act of the defendant in carrying on the charivari, and, hence, the shooting was as much the act of the plaintiff as of any other person engaged in the enterprise. It would seem that his membership in this party was merely a condition and not a cause of the injury.

§ 10. REMOTENESS OF DAMAGE; PROXIMATE CAUSE.

101. Statement of Rule. Persons often escape legal liability for the results of their wrongful conduct, on the ground that the plaintiff's harm was too remote. "A man's responsibility for his negligence," it is said, "must stop somewhere."⁸⁰ Although the general rule is, undoubtedly, that a wrongdoer must answer for the damages caused by his misconduct, our law strives to apply this rule in a practical and reasonable manner. "It is impossible to trace any wrong to all its consequences. They may be connected together and involved in an infinite concatenation of circumstances. As said by Lord Bacon, 'it were infinite for the law to judge the cause of causes, and their impulsion one of another. Therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.'⁸¹ The best statement of the rule is that a wrongdoer is responsible for the natural and proximate consequences of his misconduct."⁸²

⁷⁹ *Gilmore v. Fuller*, 198 Ill. 130, 113 Ia. 557, 85 N. W. 784, 54 L. R. 65 N. E. 84, 60 L. R. A. 286 (1892). A. 367 (1901).

Reversing same case in 99 Ill. App. 272 (1901); Cf. *Evans v. Waite*, 83 Wis. 286, 53 N. W. 445 (1892); *Horton v. Wylie*, 115 Wis. 505, 93 N. W. 245 (1902); *Osborne v. Van Dyck*, Y. 264 (1884).

⁸⁰ *Hoag v. Lake Shore, Etc. Ry.*, 85 Pa. 293 (1877).

⁸¹ *Maxims of the Law*, Reg. 1.

⁸² *Ehrgott v. Mayor, Etc.*, 96 N.

102. Line is Sometimes Arbitrary. Even in this form, the rule has proved difficult of application.⁸³ In some cases, the difficulty has been surmounted by arbitrarily drawing a line beyond which all consequences are ticketed "remote." For example, a person slanders another. Nothing is more natural than the repetition of that slander by the hearer. And yet, though this natural consequence follow immediately with serious pecuniary harm to the victim, the author of the slander is not legally answerable for the harm. His liability is limited to damage done by his original utterance. For the harm inflicted by the repetition only the repeater is liable.⁸⁴ His misconduct is the proximate cause of this harm. This will be discussed more fully in the chapter on Defamation.

A like arbitrary line has been drawn by the New York Court of Appeals in cases of negligent fires.⁸⁵ The proximate consequence is restricted to damage inflicted upon an abutting owner. If the fire extends beyond his premises, whether they be ten feet or ten miles in breadth, its destruction is too remote to make the negligent originator of the fire liable therefor. This limitation is admitted to be arbitrary, "but," it is claimed, "it recognizes the principle that we should live and let live. Fires often occur from the trivial acts of the most prudent persons. Great conflagrations are daily

⁸³. Perhaps this difficulty is best 911, 41 Am. R. 41 (1882); with Snow disclosed by comparing cases, in *v. N. Y., Etc. Ry.*, 185 Mass. 321, 70 which the facts are substantially N. E. 205 (1904).
the same, but the conclusions are ⁸⁴. *Elmer v. Fessenden*, 151 Mass. opposed, e. g., cf. *Seale v. Gulf, Etc. Ry.*, 65 Tex. 274 (1886); negligent 208 (1890). If the first speaker authorized the repetition of the slander such repetition is virtually his act through an agent, and he must answer for it. *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. R. 296 (1899).
⁸⁵. *Ryan v. New York Central*, 35 N. Y. 210, 91 Am. Dec. 49 (1866); *Hoffman v. King*, 160 N. Y. 618, 55 N. E. 401, 73 Am. St. R. 715, 46 L. R. A. 672 (1899). See able dissenting opinion of Vann, J., in which Parker, *Etc. Ry.*, 54 Wis. 342, 11 N. W. 356, C. J., concurred.

reported. Not long since one of our largest cities substantially disappeared within a single day. No person, however cautious, is exempt: misfortune may overtake him in a forgetful moment, or through fault in the members of his family or servants. No man is able to answer for all the remote consequences of his acts and those for whom he is responsible.”⁸⁶

103. The Opposite View:—In reply to this reasoning, other courts have said,⁸⁷ that it is better and more in accordance with the relative rights of others, that he should be ruined through whose negligence a number of buildings are burned, than that the various owners should suffer a loss which is in no way attributable to fault on their part. The assumption that, if a great loss is to be borne, it would better be distributed among many innocent victims than wholly visited upon the wrongdoer, does not seem either reasonable or just.

104. Leaving Remoteness to the Jury. Another way of surmounting the difficulty, inherent in this rule, is to leave the question of remoteness to the jury. It is frequently resorted to by American courts⁸⁸ although it has been criticised by eminent judges

86. Haight, J., in *Hoffman v. King*, (1872); *Bishop v. St. Paul City Ry.*, supra. Similar views are expressed 48 Minn. 26, 50 N. W. 927 (1892); in *Kerr v. Penn. Ry.*, 62 Pa. 353 *Dickson v. Omaha, Etc. Ry.*, 124 Mo. (1870). 140, 27 S. W. 476 (1894); *Gilman v.*

87. *Hoyt v. Jeffers*, 30 Mich. 181 *Noyes*, 57 N. H. 627 (1876); *Wiley v.* (1874); *Lillibridge v. McCann*, 117 West, J. Ry., 44 N. J. L. 247 (1882); Mich. 84, 75 N. W. 288, 41 L. R. A. *Ehrgott v. Mayor, Etc.*, 96 N. Y. 264 381 (1898); *Fent v. Toledo, Etc. Ry.*, (1884); *Thomas v. Central Ry. of N.* 59 Ill. 349 (1871); *Milwaukee, Etc. J.*, 194 Pa. 511, 45 At. 344 (1900); Ry. v. Kellogg, 94 U. S. 469 (1876). *Harrison v. Berkley*, 1 Strobhart

88. *Milwaukee, Etc. Ry. v. Kellogg*, 94 U. S. 469 (1876): “The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it.” S. P. *Pastene v. Adams*, 49 Cal. 87 (1874); *Village of Carterville v. Cook*, 129 Ill. 152 (1889); *Lane v. Atlantic Works*, 111 Mass. 136

Law (S. C.) 525 (1847); *Texas & Pac. Ry. v. Howell*, 224 U. S. 577, 32 Sup. Ct. 601 (1912). In this case Pott’s disease developed after the injury negligently inflicted by the railroad company upon the plaintiff, and though it was not discovered until a year after the accident, it was held that the jury were warranted in finding that defendant’s negligence was the proximate cause of the disease.

in this country,⁸⁹ and is under the ban of judicial opinion in England.⁹⁰ Lord Blackburn, after commenting on the vagueness of the rule, and comparing the line which has to be drawn, in these cases, to that between night and day, declared: "I do not think it is any one's fault that the rule cannot be put any more definitely. I think it must be left as vague as ever as to where the line must be drawn—but I think, in each case, the court must say whether it is on the one side or the other; and I do not think the question of remoteness ought ever to be left to the jury. That would be in effect to say that there shall be no such rule as to damages being too remote; and it would be highly dangerous if it was left generally to the jury to say whether the damage was too remote or not."⁹¹

Even in this country when the question of remoteness is raised by the pleadings,⁹² or when it arises upon agreed or undisputed facts from which but one inference can be drawn by reasonable men, it is to be determined by the court.⁹³ To quote from a recent

89. In *Gilman v. Noyes*, 57 N. H. 627 (1876), Ladd, J., said: "The question is, whether courts can relieve themselves from troublesome inquiries of this description by handing them over to the jury for determination. I am not prepared to admit that they can."

90. *Scott v. Shepherd*, 2 W. Bl. 892, 3 Wils. 403 (1773); *Rommey Marsh v. Trinity House*, L. R. 5 Exch. 204 (1870); *Lynch v. Knight*, 9 H. L. C. 477 (1861); *Clerk & Lindsell on Torts*, p. 116; cf. *Engelhart v. Farrant & Co.* (1897), 1 Q. B. 240, 243, 66 L. J. Q. B. 122. "In this case, if there had been any doubt of its being the effective cause, and the matter had been tried by a jury, the question must have been left to them."

91. *Hobbs v. London, Etc. Ry.*, L. R. 10 Q. B. 11, 122, 44 L. J. Q. B. 49 (1875), cited approvingly in *Glassey v. Worcester Consol. Co.*, 185 Mass. 315, 70 N. E. 199 (1904).

92. *Bosch v. Burlington, Etc. Ry.*, 44 Ia. 402 (1876); *McDonald v. Snelling*, 14 Allen (Mass.) 290 (1867); *Molbus v. Town of Waitsfield*, 75 Vt. 122, 53 At. 775 (1902).

93. *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400 (1894); *Scheffer v. Washington, Etc. Ry.*, 105 U. S. 249 (1881); *Thomas v. Lancaster Mills*, 71 Fed. 481 (1896); *Mayor, Etc. of Macon v. Dykes*, 103 Ga. 847, 31 S. E. 443 (1898); *Alexander v. Town of Newcastle*, 115 Ind. 51, 17 N. E. 200 (1888); *Bentley v. Fisch Lumber Co.*, 51 La. Ann. 451, 25 So. 262 (1899); *Martinez v. Bernhard*, 106 La. 368, 30 So. 901 (1901); *Marsh v. Great Nor. Co.*, 101 Me. 489, 64 At. 844 (1906); *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 At. 60 (1898); *Loker v. Damon*, 17 Pick. (Mass.) 284 (1835); *Carter v. Towne*, 103 Mass. 507 (1870); *Salisbury v. Herchenroder*, 106 Mass. 458 (1871); *Daniels v. N. Y., Etc. Ry.*, 183 Mass. 393, 67 N. E. 424 (1903); *Dickson v.*

decision: "The question of remote and proximate cause is generally for the jury. This proposition, however, is necessarily subject to the limitation affecting the submission of all questions of fact to the jury: that if on the evidence reasonable men can come to only one conclusion, there is no question for their decision."^{93a}

105. Usual Instruction to the Jury. In case the question is left to the jury, the court instructs them that they are to find for the plaintiff, if, in their opinion, there was an unbroken connection between the defendant's wrongful act and the plaintiff's injury, so that the injury was a result naturally and reasonably to be expected, either as the sole consequence of that and of other causes, which might reasonably have been expected to be set in motion by it, or to act in concurrence with it.⁹⁴ On the other hand, if in their opinion, the injury would not have happened, but for the intervention of some new cause, which could not have been reasonably anticipated,⁹⁵ the defendant's act is to be deemed the remote and not the proximate cause, and they should find for the defendant.⁹⁶ At

Omaha, Etc. Ry., 124 Mo. 140, 27 S. W. 476 (1894); Meyer v. King, 72 Miss. 1, 16 So. 245, 35 L. R. A. 474 (1894); Rooks v. Alabama, Etc. Ry., 78 Miss. 91, 28 So. 821 (1900); Ward v. West Jersey Ry., 65 N. J. L. 383, 47 At. 561 (1900); Mars v. Del. & Hud. Ry., 54 Hun (N. Y.), 625 (1889); Mitchell v. Rochester Ry., 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781 (1896); Ewing v. Pittsburgh Ry. Co., 147 Pa. 40, 23 At. 340 (1892); Willis v. Armstrong Co., 183 Pa. 184, 38 At. 621 (1897); Isham v. Dow's Estate, 70 Vt. 588, 41 At. 585, 45 L. R. A. 87 (1898); Loiseau v. Arp, 21 S. D. 566, 114 N. W. 701, 14 L. R. A., N. S. 855 (1908).

^{93a} McGill v. Granite Co., 70 N. H. 125, 129, 46 At. 684 (1899); Smith v. Public Service Corporation, 78 N. J. L. 478, 75 At. 937 (1910).

⁹⁴ Milwaukee, Etc. Ry. v. Kellogg, 94 U. S. 469 (1876); Binford v. Johnson, 82 Ind. 426 (1882); Lane v. Atlantic Works, 111 Mass. 136 (1872).

⁹⁵ An example of such a cause is found in Afflick v. Bates, 21 R. I. 281, 43 At. 539 (1899). Explosion of percussion caps by trespassing boy. An intervening cause fairly to be anticipated is found in Owen v. Cook, 9 N. D. 134, 81 N. W. 285, starting a "back fire." In Daniels v. N. Y., Etc. Ry., 183 Mass. 393, 67 N. E. 424 (1903), an act of suicide by one whose mind was disordered by sickness caused by defendant's negligence, was held to be a new and independent as well as the efficient cause of the death, and defendant's negligence was too remote to render it liable for the death. S. P. in Horton v. Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A., N. S. 956 (1907).

⁹⁶ Gilman v. Noyes, 57 N. H. 627 (1876). An excellent statement of the proper charge in these cases is found in Meyer v. Milwaukee, Etc. Ry., 116 Wis. 336, 93 N. W. 6 (1903); and in Andrews v. Chicago, Etc.

times, the court contents itself with instructing the jury more briefly, that the rule of law applicable to the case is, that plaintiff's injuries must be the natural and proximate consequences of defendant's misconduct; explaining that the term "natural" imports that the consequences are such as might reasonably have been foreseen, such as occur in an ordinary state of things; while the term "proximate" indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss.⁹⁷

106. Cutting Fire Hose or Obstructing Fire Apparatus. The foregoing principles have been applied in cases brought against those who have prevented firemen from promptly reaching fires or have interfered with their work of extinguishing them. If defendant's conduct, though wrongful towards the public, is not violative of any legal right of the plaintiff, it cannot be considered the proximate cause of the destruction of plaintiff's property.⁹⁸ If, however, the defendant negligently cuts hose through which water is being thrown upon the fire,⁹⁹ or obstructs the streets through which it has notice that fire apparatus will pass on its way to the fire,^{99a} and thus prevents the firemen from arresting or extinguishing the fire, his misconduct may be the proximate cause of plaintiff's loss. But it will be legally remote, if defendant had no notice of the fire or of other facts indicating that its conduct would be harmful to

Ry., 96 Wis. 348, 71 N. W. 372 (1897). to plaintiff's building; but plaintiff had no legal right to have the bank

^{97.} Wiley v. West Jersey Ry., 44 left in its original condition.

N. J. L. 247 (1882); Smith v. Public ^{99.} Little Rock Traction, Etc. Co. Service Corporation, 78 N. J. L. 478, v. McCaskell, 74 Ark. 103, 86 S. W. 75 At. 937 (1910); Batton v. Public 997, 70 L. R. A. 680, 112 Am. St. R. Service Corporation, 75 N. J. L. 857, 48 (1905); Metallic, Etc. Ry. v. Fitchburg Ry., 109 Mass. 277, 12 Am. 69 At. 164, 18 L. R. A., N. S. 640 R. 689 (1872); Phoenix Ins. Co. v. (1908); Ehrgott v. Mayor, Etc., 96 N. Y. C. & H. R. Ry., 122 App. Div. N. Y. 264 (1884); Harrison v. Berkeley, 1 Strob. L. (S. C.) 525 (1847); 113, — N. Y. Supp. 696 (1907), aff'd 196 N. Y. 554, 90 N. E. 1164 (1905). Isham v. Davis Estate, 70 Vt. 588, 41 ^{99a.} Houren v. Chic., M. & St. P. At. 585, 45 L. R. A. 87 (1898). Ry., 236 Ill. 680, 86 N. E. 611, 20 L.

^{98.} Bosch v. B. & M. Ry., 44 Ia. Ry., 236 Ill. 680, 86 N. E. 611, 20 L. 402 (1876). Defendant had filled in R. A., N. S. 1110, 127 Am. St. R. 309 along the river bank to such an extent (1908); Cleveland, C., C. & St. L. Ry. as to prevent the fire engines v. Tauer, — Ind. —, 96 N. E. 758, from throwing water from the river 39 L. R. A., N. S. 20 (1911).

plaintiff, or to some one similarly situated.^{99b} The negligent failure of a telephone company to give telephone connection between plaintiff and the fire department has been held too speculative and remote to authorize a recovery.^{99c}

107. **Intentional wrongdoing** often subjects one to liability for consequences which would be deemed remote in the case of mere negligence. If defendant is engaged in a clearly unlawful act he will be held answerable for the natural results of his act, though they would be treated as accidental,^{99d} or improbable,^{99e} had his act been merely negligent.

108. **Legal Cause.** This phrase has been proposed as a substitute for proximate cause^{99f} but neither the courts nor the text

99b. *Am. Sheet & Tin P. Co. v. Pittsburgh & L. E. Ry.*, 143 Fed. 789, 75 C. C. A. 47 (1906). "We are of opinion, therefore, as to the first question, that there is no evidence in this case, sufficient to require the same to be submitted to the jury, that defendant's servants were in any manner informed of the existence of the fire on plaintiff's property, or had any notion, from observation, or otherwise, of a situation which required them to stop, or demanded extra caution on their part, until after the stoppage of the train at or near the Fifteenth street crossing."

99c. *Lebanon, Etc. Tel. Co. v. Lenham L. Co.*, 131 Ky. 718, 115 S. W. 824, 21 L. R. A., N. S. 115 (1909). The petition proceeds upon the theory that had defendant's agent acted promptly all the other agencies would have been put in motion promptly and would have been able to put out the fire. This, the court thought, was pure speculation.

99d. *Osborne v. Van Dyke*, 113 Ia. 557, 85 N. W. 784, 54 L. R. A. 367 (1901). Defendant while cruelly beating a horse with a stick having

a nail in it, slipped and unintentionally hit plaintiff. The defendant was doing an unlawful act and was held liable for the damages done to plaintiff, the accidental slip not shielding him.

99e. *Wyant v. Crouse*, 127 Mich. 158, 86 N. W. 527, 53 L. R. A. 627 (1901). Defendant broke into a shop and started a fire, which later consumed it. He was held liable, though he was not negligent in managing the fire, and the manner in which it ignited the building was unexplained: *Eten v. Luyster*, 60 N. Y. 252, 260 (1875). Defendant wrongfully removed plaintiff's feed box from a building and was held liable for the loss of a quantity of money, which defendant strangely kept in the feed box. The improbability of money being kept in the feed box did not make the loss too remote.

99f. Joseph W. Bingham, in 9 *Columbia Law Rev.* 16, 136, 154 (1909); Jeremiah Smith in 25 *Harvard L. Rev.* 103, 223 303 (1912). Judge Smith states the problem in this form: "What constitutes such a relation of cause and effect between defendant's tort and plaintiff's dam-

writers have yet evinced a disposition to sanction the change in terminology. Its advocates declare that the old phrase is unsatisfactory and confusing, while the new term will of itself indicate that the question in this class of actions is not "what philosophers or logicians will say is the cause, but what the courts will regard as the cause."

§ 11. MENTAL ANGUISH; WOUNDED FEELINGS; FRIGHT; NERVOUS SHOCK.

109. **Mental Anguish not a Cause of Action.** "It is undoubted law that mental pain or anxiety alone, unattended by any injury to the person, cannot sustain an action."¹⁰⁰ But, suppose such mental suffering cause physical sickness, disabling the sufferer from attending to his ordinary business and compelling him to incur expense for medical treatment: has the victim a cause of action against the wrongful disturber of his piece of mind?

110. **Origin of Doctrine.** This question appears to have presented itself first for judicial decision in defamation cases, and that, too, in quite recent times. The answer of the New York Court of Appeals¹ is as follows: "It would be highly impolitic to hold all language, wounding the feelings and affecting unfavorably the health and ability to labor of another, a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him; and his physical strength and ability to bear them. * * * In the present case the words were defamatory,² and the illness and physical prostration of the plaintiff may be assumed to have been actually produced by the slander: but, this consequence was not, in a legal view, a natural and ordinary one, as it does not prove that the plaintiff's character was injured. * * * Such

age as is sufficient to maintain an 53, 72 Am. Dec. 420 (1858), overruling action of tort?" And offers this ing *Bradt v. Towsley*, 13 Wend. (N. rule: "Defendant's tort must have Y.) 253 (1835), and *Fuller v. Fen-* been a substantial factor in produc- ner, 16 Barb. (N. Y.) 333 (1853). ing the damage complained of." 2. The words imputed inconti-

100. *Beven on Negligence* (2nd ed. nency to the plaintiff, but were not Ed.) 77 (1895); (3rd Ed.), 67 (1907). actionable *per se*.

1. *Terwilliger v. Wanda*, 17 N. Y.

an effect may, and sometimes does, follow from such a cause, but not ordinarily; and the rule of law was framed in reference to common and usual effects, and not those which are accidental or casual."

Two years later a similar case^{2a} came before the English Court of Exchequer and evoked the same answer. Pollock, C. B., said: "This particular damage depends upon the temperament of the party affected, and it may be laid down that illness arising from the excitement which the slanderous language may produce is not that sort of damage which forms a ground of action." Bramwell, B., said: "The question seems to me one of some difficulty, because a wrong is done to the female plaintiff who becomes ill, and therefore there is damage alleged to be flowing from the wrong; and I think it did in fact so flow. But I am struck by what has been said as to the novelty of this declaration, that no such special damage ever was heard of as a ground of action. * * * There is certainly no precedent for such an action, probably because the law holds that bodily illness is not the natural consequence of the speaking of slanderous words. Therefore, on the ground that the damage here alleged is not the natural consequence of the words spoken by the defendant, I think the action will not lie."^{2b}

111. Mental Anguish Accompanying Actionable Defamation. While the doctrine of the foregoing decisions has been accepted, generally, both in England and in this country, it is also agreed that in case of libel, or of slander actionable *per se*, sickness due to the plaintiff's mental distress, and even the injury to her feelings though not causing sickness, may be taken into account by the jury in assessing damages.³

2a. Allsop v. Allsop, 5 H. & N. 534, the one is unsettled and the other 29 L. J. Exch. 315 (1860); Lynch v. Knight, 9 H. L. C. 577 (1861), accord. that pecuniary injury would not result from the loss of health and the

2b. In McQueen v. Fulgham, 27 Tex. 463, 469 (1864), a case also of slanderous words not actionable *per se*; the court declared that it could not "say as a matter of law, that the words of a ribald and malignant slanderer may not prey like a cancer upon the mind and health of a sensitive and nervous female, until

3. Odgers, Libel and Slander (3d Ed.) 353; Johnson v. Robertson, 8 Port. (Al.) 486 (1839); Swift v. Dickerman, 31 Conn. 285 (1863); Pugh v. McCarty, 40 Ga. 444 (1869); Dufort v. Abadie, 23 La. Ann. 280

112. **Soliciting Sexual Intercourse.** A similar distinction has been made in cases where sexual intercourse has been solicited. An action will not lie, it is said, in favor of a woman against a man, who, without trespass or assault, solicits her to illicit intercourse, though the humiliation and mental distress "unnerved and damaged her."⁴ But it will lie, if his solicitation amounts to a technical assault or trespass; and, in the latter case, the injury to feelings, the mental distress, as well as the physical sickness induced thereby may be taken into account by the jury in assessing damages.⁵

113. **Worry and Fright Caused by Defendant's Misconduct.** Where the consequences of the defendant's wrongdoing are limited to the mental disturbance of the plaintiff, and the wrongdoing is not actionable in behalf of the plaintiff, apart from such consequences, any harm sustained by the plaintiff is deemed *damnum absque injuria*. Thus far there is entire unanimity of decisions.⁶ When, however, the worry or fright causes physical derangement,

(1871); *Wilson v. Noonan*, 35 Wis. 321 (1874); *Zeliff v. Jennings*, 61 Tex. 458 (1884).

4. *Reed v. Maley*, 115 Ky. 816, 74 S. W. 1079, 25 Ky. L. Rep. 209, 62 L. R. A. 900 (1903); *Davis v. Richardson*, 76 Ark. 348, 89 S. W. 318 (1905).

5. *Newell v. Whitcher*, 53 Vt. 589, 38 Am. R. 703 (1880). The court charged the jury that, if the plaintiff was so frightened and shocked in her feelings as to injure her health, by defendant's conduct, she should receive damages for such injury. The defendant's counsel asked the court to charge, in substance, that if defendant's acts and conduct would not have injured a person of ordinary nerve and courage, then there can be no recovery. On appeal, the Supreme Court upheld the charge and the refusal of defendant's request, declaring that as defendant's conduct amounted to an assault he must answer for all act-

ual injuries, and affirmed a judgment for \$225, including \$100 for exemplary damages. *Bruske v. Neugent*, 116 Wis. 488, 93 N. W. 454 (1903). Verdict for \$500 upheld, the court saying: "The mere physical or pecuniary injury was, of course, insignificant; but the outrage to the feelings of a modest and chaste woman, resulting from the immoral solicitation which she testifies accompanied the assault, is such that we cannot feel justified in deeming the allowance of \$500 so grossly excessive as to justify this court in interfering."

6. *Beven on Negligence* (3rd Ed.) 67; *Kalen v. Terre Haute Ry.*, 18 Ind. App. 202, 47 N. E. 694, 63 Am. St. R. 343 (1897); *Wyman v. Leavitt*, 71 Me. 227, 36 Am. R. 303 (1880); *Turner v. Great Nor. Ry.*, 15 Wash. 213, 46 Pac. 243 (1896); *Buengle v. Newport A. Assoc.*, 29 R. I. 23, 68 At. 721, 14 L. R. A., N. S. 1242 (1908).

differences of opinion immediately develop, and it becomes impossible to reconcile the various judicial views of the wrongdoer's liability.

114. Physical Derangement Caused by Fright or Mental Disturbance. At one extreme, are the cases which deny the right to recover for a physical injury, resulting from fright or mental anguish alone. "Assuming that fright cannot form the basis of an action," say these authorities, "it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether recovery may be had for the fright."^{6a}

At the other extreme, are the cases which hold that a recovery may be had for sickness, physical derangement or physical pain, resulting directly from fright or mental anguish, caused by the defendant's wrongdoing; provided that the defendant would have been liable, had his misconduct caused the sickness, derangement or pain, without the intervention of the fright or mental disturbance.⁷ In order to bring a case within the foregoing proviso the

^{6a} *St. Louis, Etc. Ry. v. Bragg*, At. 340, 14 L. R. A. 666, 30 Am. St. 69 Ark. 402, 64 S. W. 226, 86 Am. R. 709 (1892); *Chittick v. Phila. Rap. St. R.* 206 (1901); *Braun v. Craven, Tr. Co.*, 220 Pa. 13, 73 At. 4 (1909); 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199 (1898); *Kansas City Ry. v. Dalton*, 65 Kas. 661, 70 Pac. 645 (1902); *Morse v. Chesapeake Ry.*, 117 Ky. 228 Pa. 198, 77 At. 445 (1910); *Reed v. Ford*, 129 Ky. 471, 33 Ky. L. R. 1029, 112 S. W. 600, 19 L. R. A. N. S. 225 (1908); *Spade v. Lynn, Etc. Ry.*, 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512 (1897); *Trigg v. St. Louis, Etc. Ry.*, 74 Mo. 147, 41 Am. R. 305 (1881); *Ward v. West Jersey Ry.*, 65 N. J. L. 383, 47 At. 561 (1900); *Mitchell v. Rochester Ry. Co.*, 157 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. R. 604 (1896); *Ewing v. Pittsburgh, Etc. Ry.*, 147 Pa. St. 40, 23

temporarily blinded by electrical manifestation, but no physical contact: *Morris v. Lack. & Wy. V. Ry.*, 77 At. 445 (1910); nervous shock and miscarriage: *Victorian Ry. Commissioners v. Coultas*, 13 App. Cas. 222, 57 L. J. P. C. 69 (1888).

⁷ *Fitzpatrick v. Great Western Ry.*, 12 Up. C. Q. B. 645 (1854); *Bell v. Great Nor. Ry.*, 26 L. R. Ir. 428 (1890); *Dulleu v. White* (1901), 2 K. B. 669, 70 L. J. K. B. 837; *Sloane v. Southern Cal. Ry.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193 (1896). Defendant's misconduct consisted in tortiously ejecting (without using

plaintiff must show, not only that defendant's conduct was wrongful towards some one, but that it was a breach of legal duty owing to him by the defendant. Accordingly, if A is made sick by the shock of seeing another person maltreated, or of seeing his own property negligently injured,⁸ he has no cause of action against the wrongdoer, as these facts fall short of establishing a breach of legal duty to the plaintiff by the wrongdoer.⁹ For the law to furnish redress for mental suffering or its physical consequence, "there must be an act which, under the circumstances, is wrongful; and it must take effect upon the person, the property, or some other legal interest of the party complaining. Neither one without the other is sufficient. This is but another way of saying that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him suffering."¹⁰

physical force) the plaintiff from a train. Insomnia and paroxysms resulted from humiliation and indignity. *Watson v. Dills*, 116 Ia. 249, 89 N. W. 1068 (1902). Defendant wrongfully entered the house of plaintiff's husband, which was her house, and to the peaceful and quiet enjoyment of which she was legally entitled, and this invasion "produced physical injury to her through fright resulting in nervous prostration." Cf. *Ford v. Schlimman*, 107 Wis. 479, 83 N. W. 761 (1900), limiting recovery to trespass to house; *Purcell v. St. Paul, Etc. Ry.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203 (1892); *Mack v. South, Etc. Ry.*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. R. 913 (1898); *Gulf, Col., Etc. Ry. v. Hayter*, 93 Tex. 239, 54 S. W. 944, 77 Am. St. R. 856, 47 L. R. A. 325 (1900); *Simone v. Rhode Island Co.*, 28 R. I. 186, 66 At. 202, 9 L. R. A., N. S. 740 (1907). See a full discussion of this topic in *Sedgwick on Damages* (9th Ed.), §§ 43-47, inclusive.

8. This doctrine has been applied in a case where the dead body of plaintiff's child was negligently, but not wantonly, thrown from a wagon by a collision between a train and the wagon. *Hackenhammer v. Lex. & E. Ry. (Ky.)*, 74 S. W. 222 (1903).

9. *Smith v. Johnson & Co.*, unreported but cited and approved in (1901) 2 K. B., at p. 675; *Mahoney v. Dankwort*, 108 Ia. 321, 79 N. W. 134 (1899); *Kansas City Ry. v. Dalton*, 65 Kas. 661, 70 Pac. 645 (1902); *Buckman v. Great Nor. Ry.*, 76 Minn. 373, 79 N. W. 98 (1899); *Sanderson v. Nor. Pac. Ry.*, 88 Minn. 162, 92 N. W. 542 (1902).

10. *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 28 Am. St. R. 370, 14 L. R. A. 85 (1891); cf. *Hutchinson v. Stern*, 115 App. Div. 791, 101 N. Y. Supp. 145 (1906), appeal dismissed 189 N. Y. 577, 82 N. E. 1128 (1907). Plaintiff suing for assault cannot recover damages for fright and mis-carriage of wife.

115. Mutilation of a Dead Body. While the law does not recognize a right of property in a corpse, it does accord a right of custody, control and disposition for proper sepulture, first to the surviving spouse, and secondly to the next of kin in the order of relation to the deceased. If this right is invaded by mutilation of the body^{10a} without lawful justification,^{10b} its possessor may recover damages for injured feelings.

116. Reasons for Denying Remedy. Courts which deny all remedy for fright, or like disturbance of the mind and nerves, assign one or both¹¹ of the following reasons for their holdings. First: That physical suffering, sickness or permanent harm is not the probable or natural consequence of fright or nervous shock, in the case of a person of ordinary physical and mental vigor.¹² Hence, plaintiff's injury is declared to be, as a matter of law, not the proximate, but the remote result of defendant's wrongdoing. Second: That damages sustained by fright or nervous shock must be refused, because of the impracticability of satisfactorily administering any other rule.¹³

10a. *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759 (1868); *Lyndh v. Great Nor. Ry.*, 99 Minn. 408, 109 N. W. 823 (1906); *Kyles v. Southern Ry.*, 147 N. C. 394, 61 S. E. 278, 16 L. R. A., N. S. 405 (1908); *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 At. 878, 64 L. R. A. 179 (1904); *McGann v. McGann*, 28 R. I. 130, 66 At. 52 (1907); *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40, 68 L. R. A. 956 (1905).

10b. *Medical Coll. of Ga. v. Rushing*, 1 Ga. App. 468, 57 S. E. 1083 (1907); *Louisville & N. Ry. v. Blackmore*, 3 Ga. App. 80, 59 S. E. 341 (1907); *Rushing v. Medical Coll. of Ga.*, 4 Ga. App. 823, 62 S. E. 563 (1908); *Meyers v. Duddenhauser*, 122 Ky. 866, 90 S. W. 1049, 5 L. R. A., N. S. 727 (1906); autopsy ordered by board of health is justifiable.

11. *Mitchell v. Rochester Ry.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. R. 604 (1896). See *Chicago, Etc. Ry. v. Caulfield*, 63 Fed. 396, 11 C. C. A. 552, with valuable note, pp. 556-583 (1894). **12.** *Victorian Ry. Commis. v. Coultas*, 13 App. Cas. 222, 57 L. J. P. C. 69 (1888); *Atchison, T., Etc. Ry. v. McGinnis*, 46 Kan. 100, 26 Pac. 453 (1891); *Kansas City Ry. v. Dalton*, 65 Kan. 661, 70 Pac. 645 (1902); *Ward v. West Jersey Ry.*, 65 N. J. L. 383, 47 At. 561 (1900); *Ewing v. Pittsburgh Ry. Co.*, 147 Pa. 40, 30 Am. St. R. 709, 14 L. R. A. 666, 23 At. 340 (1892). The same doctrine applied in a case, where a horse was so frightened by defendant's negligence that it died of a ruptured blood vessel. *Lee v. City of Burlington*, 113 Ia. 356, 35 N. W. 618 (1901).

13. *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199 (1898); *Spade v. Lynn, Etc. Ry.*, 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512

117. An Arbitrary Test. It is quite apparent that the courts which adopt the first of these reasons prefer an arbitrary rather than a logical test of remoteness. Even though it is admitted by the pleadings that by reason of defendant's negligence, plaintiff was subjected to great danger of being run down and killed by a railroad train, and by reason of the danger to which he was thus exposed, he was shocked, paralyzed and otherwise injured, these courts declare that the paralysis is a remote result of the negligence.¹⁴ If, when subjected to such danger, plaintiff had jumped and fallen, and the fall had shocked his nervous system so as to impair his health,¹⁵ or had resulted in serious harm to his knee,¹⁶ the same courts would declare the injury not remote. That serious physical disorder is the every-day consequence of fright or nervous shock is a fact not only established by modern science, but one which has long been accepted by the ordinary man.¹⁷ It would seem, therefore, to fall within the category of natural and probable consequences.^{17a}

118. Unsatisfactory Test. The second reason assigned for denying recovery, in cases now under consideration, does not appear to be entirely satisfactory, even to the courts which continue to apply it. The Supreme Court of Massachusetts has declared recently:¹⁸ "It is an arbitrary exception, based upon a notion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone. But where there has been a battery and the nervous shock results from the same wrongful management as the battery, it is at least equally impracticable to go further and to inquire whether the shock comes through the battery or along with it. Even were it otherwise, recognizing as

(1897); *Homans v. Boston Elevated Ry.*, 180 Mass. 456, 62 N. E. 737 (1900), and authorities therein cited. *Watson v. Dilts*, 116 Ia. 249, 89 N. W. 1068 (1902).

14. *Ward v. West Jersey Ry.*, 65 N. J. L. 383, 47 At. 561 (1900).

15a. *Mattingly v. Houston*, 167 Ala. 167, 52 So. 78 (1909); *Spearman v. McCrary*, — Ala. —, 58 So. 927 (1912), and note in 12 Colo. Law Rev. 752.

16. *Tuttle v. Atlantic City Ry.*, 66 N. J. L. 327, 49 At. 450, 88 Am. St. R. 491, 54 L. R. A. 582 (1901).

17. *Buchanan v. West Jersey Ry.*, 52 N. J. L. 265, 19 At. 254 (1890).

18. *Homans v. Boston El. Ry.*, 180 Mass. 456, 62 N. E. 737, 91 Am. St. R. 324, 57 L. R. A. 291 (1902).

we must the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong was a shock to the nerves, we think that when the reality of the case is guaranteed by proof of a substantial battery of the person there is no occasion to press further the exception to general rules. The difference between this case and the *Spade Case*,¹⁹ in its second presentation, is that in the latter the defendant's wrong, if any, began with the battery, and it was not responsible for the previous sources of fear, whereas here the defendant was responsible for the trouble throughout."

119. Law Values Feelings. Moreover, all courts agree that when the defendant's misconduct causes a physical injury to plaintiff,²⁰ however slight, or, without physical harm, wrongfully invades his right of personal security,²¹ or liberty,²² or reputation,²³ he is entitled to have the jury estimate and assess the damages which he has sustained by reason of injured feelings. The objection, therefore, that the law cannot value mental pain or anxiety,²⁴ and that a claim for injury to feelings is purely transcendental, belonging to the realm of fancy rather than of fact,²⁵ seems open to criticism. While damages for injury to feelings are frequently too shadowy and speculative to be properly measured,²⁶ this is

19. *Spade v. Lynn Ry.*, 172 Mass. Ry. Co., 77 Ia. 54, 41 N. W. 564 488, 52 N. E. 747, 43 L. R. A. 832, 70 (1884); *Craker v. Chicago & N. W. Am. St. R.* 298 (1899).

20. *Canning v. Inhabitants of Williamstown*, 1 Cush. (Mass.) 451 (1848); *Warren v. Boston, Etc. Railway Co.*, 163 Mass. 484, 40 N. E. 895 (1895); *Consolidated Traction Co. v. Lambertson*, 59 N. J. L. 297, 36 At. 100 (1896). This doctrine seems to have been overlooked in *Gulf, Etc. Ry. v. Trott*, 86 Tex. 412, 25 S. W. 419, 40 Am. St. R. 866 (1894).

21. *Head v. Georgia, Etc. Ry.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. R. 434 (1887); *Mabry v. City Elec. Ry.*, 116 Ga. 624, 42 S. E. 1025, 59 L. R. A. 590 (1902); *Kline v. Kline*, 158 Ind. 602, 64 N. E. 9, 58 L. R. A. 397 (1902); *Shepherd v. Chicago, Etc. Ry. Co.*, 77 Ia. 54, 41 N. W. 564 (1884); *Craker v. Chicago & N. W. Ry. Co.*, 36 Wis. 657, 17 Am. R. 504 (1875); *Williams v. Nor. Pac. Ry.*, 5 Wash. 621, 32 Pac. 468 (1893).

22. *Gibney v. Lewis*, 68 Conn. 392, 36 At. 799 (1896); *Young v. Gormley*, 120 Ia. 372, 94 N. W. 922 (1903). **23.** *Swift v. Dickerman*, 31 Conn. 285 (1863); *Cole v. Atlantic, Etc. Ry.*, 102 Ga. 474, 31 S. E. 107 (1897); *Magonrick v. W. U. Tel. Co.*, 79 Miss. 632, 31 So. 206 (1901).

24. *Lynch v. Knight*, 9 H. L. C. 577 (1861).

25. *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 54 L. R. A. 846 (1901), and cases cited.

26. *Mahony v. Dankwart*, 108 Ia. 321, 79 N. W. 134 (1899); *Wyman v.*

no reason for denying their recovery in all cases. It may well be urged by defendant's counsel as a powerful reason for a verdict in his favor, or for a sharp scrutiny by an appellate court of a verdict against him. Beyond this, it should have no effect.²⁷

120. Mental Anguish Caused by Illegal Conduct. In most cases of this kind, the defendant commits a tort towards the plaintiff to which the mental anguish is incidental, such as an assault²⁸ or false imprisonment; and the courts are substantially agreed in granting a recovery.²⁹ Occasionally, however, the very gist of the defendant's wrongdoing, as far as the plaintiff is concerned, is in frightening the plaintiff, or in causing him either mental or nervous disturbance. Here, too, the courts are disposed to uphold verdicts for damages, when the evidence shows clearly that the defendant acted willfully or wantonly.³⁰

Leavitt, 71 Me. 227, 36 Am. R. 303 (1880); Fox v. Bradley, 126 Pa. 604, 17 At. 604 (1889); Bovee v. Town of Danville, 53 Vt. 183, 190 (1880); Turner v. Great Nor. Ry., 15 Wash. 213, 46 Pac. 243 (1896).

27. Western U. T. Co. v. Ferguson, 157 Ind. 64, 78. (Dissenting opinion), 60 N. E. 1080 (1901); Mentzer v. W. U. Tel. Co., 93 Ia. 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. R. 294 (1895).

28. Barbee v. Reese, 60 Miss. 906 (1883). (Defendant, while intoxicated, threatened to shoot plaintiff, who fled and suffered miscarriage because of her fright). See cases cited in preceding paragraph.

29. Razzo v. Varni, 81 Cal. 289, 22 Pac. 848 (1889); Preiser v. Wielandt, 48 App. Div. 569, 62 N. Y. Supp. 890 (1900); Williams v. Underhill, 63 App. Div. 223, 71 N. Y. Supp. 29 (1901); Hill v. Kimball, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618 (1890).

30. Wilkinson v. Downton (1897), 2 Q. B. 57, 66 L. J. Q. B. (Defendant falsely told plaintiff that her husband had broken both legs, intend-

ing her to believe it. She did believe it, and became seriously ill from the nervous shock.) Cf. Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335 (1899), where defendant was held not liable for frightening plaintiff, by way of a joke. He was harmlessly insane and acted without malicious motives or the intent to harm any one. Rice v. Rice, 104 Mich. 371, 62 N. W. 834 (1895). At page 381 the court approved the charge of the trial judge, that plaintiff in a suit for the alienation of her husband's affections "was entitled to recover for mental anguish and suffering, mortification, and embarrassment" due to defendant's misconduct. In Conklin v. Thompson, 29 Barb. (N. Y.) 218 (1859), defendant willfully, and without a license, exploded fire-crackers in a public street, intending to frighten plaintiff's horse. It was frightened, and died immediately. A verdict for plaintiff was sustained on appeal. In Lee v. City of Burlington, 113 Ia. 356, 85 N. W. 618 (1901), a demurrer was sustained to plaintiff's complaint, which

Especially is this so, where the mental or nervous disturbance is incident to intentional trespass upon property,^{30a} or to such interference with the plaintiff's comfortable enjoyment of property as amounts to actionable nuisance.^{30b}

121. Punishing the Wrongdoer. In some jurisdictions, these damages are awarded as a punishment of the defendant rather than as compensation of the plaintiff.³¹ The prevailing view, however, is that these damages, though not measurable by market values or price lists, are compensatory, and that the "amount is to be left to the sound discretion of the jury."³²

Some courts refuse to award any damages for the humiliation and shame of a passenger who is cursed, orally abused and threatened with ejection from the train, if the insolent agent does nothing towards carrying out his threat, and the passenger and his baggage are duly carried to their destination.^{32a}

sought recovery for the value of a horse frightened to death by defendant's negligent management of a steam roller in a city street. See *Watkins v. Kaolin Manf. Co.*, 131 N. C. 536, 42 S. E. 983, 60 L. R. A. 617 (1902); *Dunn v. Wes. U. Tel. Co.*, 2 Ga. App. 845, 59 S. E. 189 (1907), citing the text.

30a. *Mattingly v. Houston*, 167 Ala. 167, 52 So. 78 (1909); *Bouillon v. Laclade Gaslight Co.*, 148 Mo. App. 462, 129 S. W. 401 (1910). The court refused to apply this doctrine to the case of an owner of a pet cat which was killed by defendant's trespassing dog, where there was no evidence defendant knew of the dog's viciousness, and the defendant did not accompany the dog. *Buchanan v. Stout*, 123 App. Div. 648, 108 N. Y. Supp. 38 (1908).

30b. *Green v. Shoemaker & Co.*, 111 Md. 69, 73 At. 688, 23 L. R. A., N. S. 667 (1909).

31. *Chappell v. Ellis*, 123 N. C. 259, 31 S. E. 709, 68 Am. St. R. 822 (1898).

32. *Young v. Gormley*, 120 Ia. 372, 94 N. W. 922 (1903), and cases cited. In *McChesney v. Willson*, 132 Mich. 252, 93 N. W. 627 (1903), the court said: "Our understanding is that the rule in this state limits exemplary damages to the aggravation of the injury to feelings which arises from malice, and does not permit damages for the purpose of punishment;" *Krehbiel v. Henkle*, 152 Ia. 604, 129 N. W. 945 (1911); *Kurpge-welt v. Kirby*, 88 Neb. 72, 129 N. W. 177 (1910); *Henderson v. Weidman*, 88 Neb. 813, 130 N. W. 579 (1911).

32a. *St. Louis, I., M. & S. Ry. v. Taylor*, 84 Ark. 42, 104 S. W. 551 (1907); *Pierce v. St. Louis, I., M. & S. Ry.*, 94 Ark. 489, 127 S. W. 707 (1910). In *Gillespie v. Brooklyn*, 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618 (1904), the defendant was held liable for such abusive treatment, though there was no personal battery. In this case, however, the defendant's conductor refused to give the passenger her change, insisting

122. Mental Anguish Caused by the Negligence of Telegraph Companies. In many jurisdictions, this is recognized as a distinct cause of action, independent of any physical injury to the plaintiff or of any malicious intent of the defendant, although the courts are not entirely agreed as to the ground upon which the right to damages is based. The pioneer case³³ on this topic declares: that when a telegraph message announces the death of the plaintiff's parent, or other near and dear relative, the natural result of negligence in delivering it, is to "inflict upon the mind the sorest disappointment and sorrow," and that the damages "resulting therefrom constitute general damages, recoverable under a general averment of damage." Emphasis was also laid upon the fact that telegraph companies exercise and enjoy special franchises and privileges under the law, which ought to subject them to a duty of care, over and above their contract obligation. A breach of this duty, it is declared by most courts which have followed this Texas decision, is a common law tort, subjecting the tort-feasor to at least nominal damages; and, when the message is such as fairly to apprise him of the mental suffering which will naturally follow the failure to deliver it, damages for such suffering are recoverable upon the same principle that gives them in cases of wrongful ejection from a train, or of false imprisonment, or of assault, untended with actual bodily injury or pain.³⁴

that the passenger had handed him only the fare. Here the company was guilty of breach of contract as well as of duty to treat the passenger decently, and hence the court held that "in an action to recover damages for the breach of that contract and for the tortious acts of the conductor in relation thereto, the conduct of such employee and his treatment of the plaintiff at the time may be considered upon the question of damages, and in aggravation thereof."

^{33.} So *Relle v. W. U. T. Co.*, 55 Tex. 308, 40 Am. R. 805 (1881).

^{34.} *Western U. T. Co. v. Henderson*, 89 Ala. 510, 7 So. 419 (1889); *Mentzer v. W. U. T. Co.*, 93 Ia. 752, 62 N. W. 1, 28 L. R. A. 72 (1895); *Chapman v. W. U. T. Co.*, 90 Ky. 265, 13 S. W. 880 (1890); *Graham v. W. U. T. Co.*, 109 La. 1069, 34 So. 91 (1903); *Young v. W. U. T. Co.*, 107 N. C. 384, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. R. 883 (1890); *Wadsworth v. W. U. T. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. R. 864 (1888); *Stuart v. W. U. T. Co.*, 66 Tex. 580, 18 S. W. 351, 59 Am. R. 623 (1886). This doctrine has received legislative sanction in some states. See *Marsh v. W. U. T. Co.*, 65 S. C. 430, 43 S. E. 953 (1903), applying the statute of 1901, Sess. L., p. 693; *Butler v. West. Un. T. Co.*, 77 S. C. 148, 57 S. E. 757 (1907).

Whether the message does fairly apprise the telegraph company that mental anguish will naturally and approximately follow negligence of delivery, is often a troublesome question.³⁵ The practical difficulties attendant upon answering it have led some courts to retreat from the Texas leadership, and join the more conservative side.³⁶ A few courts permit a recovery for mental suffering only when the conduct of the telegraph company is wanton or grossly negligent.³⁷

A nice question, in the conflict of laws, has arisen in some of these cases. In the State where the telegram is received for transmission, the law does not allow damages for mental anguish; while they are allowed in the State where the message is deliverable. If the failure to deliver causes the sender mental anguish, and he sues in the jurisdiction where the message was deliverable, is his right of action determined by the law of the first or the second jurisdiction? The law of the latter jurisdiction has been held to govern, and this decision seems to be correct.³⁸

123. Texas Doctrine Generally Rejected. The weight of judicial authority is opposed to the Texas doctrine, and denies a recovery for damages for mental anguish only, resulting from negligent failure to deliver a telegraphic message. The principal rea-

³⁵. In *W. U. T. Co. v. Ayers*, 131 Ala. 391, 31 So. 78, 90 Am. St. R. 92 (1901), a message calling an uncle to the death bed of a nephew was not notice that damages would ensue; while in *W. U. T. Co. v. Crocker*, 135 Ala. 492, 33 So. 45, 59 L. R. A. 398 (1902), a message to a grandmother was notice. Cf. *Robinson v. W. U. T. Co.*, 24 Ky. L. R. 452, 68 S. W. 656, 57 L. R. A. 611 (1902), message related to sending money; mental anguish not recoverable: *Helms v. West. U. T. Co.*, 143 N. C. 386, 55 S. E. 831, 8 L. R. A., N. S. 249 (1906).

³⁶. *W. U. T. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 54 L. R. A. 846 (1901).

³⁷. *W. U. T. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283 (1903); *Butler v. W.*

U. T. Co., 62 S. C. 223, 40 S. E. 162 (1901); and see *W. U. T. Co. v. Seed*, 115 Ala. 670, 22 So. 474 (1896).

³⁸. *Gray v. W. U. T. Co.*, 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301 (1901), and valuable note on the topic; *West. U. T. Co. v. Laceo*, 122 Ky. 829, 93 S. W. 34, 5 L. R. A., N. S. 751 (1906). But a different view is taken in *Johnson v. West. U. T. Co.*, 144 N. C. 410, 57 S. E. 122, 10 L. R. A., N. S. 256 (1907), the action being treated as one for breach of contract, rather than of tort. Cf. *West. U. T. Co. v. Waller*, 96 Tex. 589, 74 S. W. 751 (1903) holding that such damages are recoverable in the state from which the message was sent, although the law of the state in which the message was deliverable did not allow them.

sons assigned for this view are; that damages for mental suffering alone were never allowed at common law: that such damages must be uncertain, indefinite and speculative, and open "into a field without boundaries," and that "the mental anguish doctrine awards damages for a state of mind, that is not at all dependent upon or measurable by a cause of action, existing outside the mental contemplation of the plaintiff, and provable by evidence of both parties." 39

39. *Peay v. W. U. T. Co.*, 64 Ark. 345, 20 L. R. A. 172, 38 Am. St. R. 538, 43 S. W. 965, 39 L. R. A. 463 575 (1893); *Morton v. W. U. T. Co.*, (1898); *Russell v. W. U. T. Co.*, 3 53 Ohio St. 431, 41 N. E. 689, 32 L. R. Dak. 315, 19 N. W. 408 (1884); *Internat. O. T. Co. v. Saunders*, 32 Fla. 434, 14 So. 148, 21 L. R. A. 810 735, 53 Am. St. R. 648 (1896); *Butner v. W. U. T. Co.*, 2 Okla. 234, 37 Pac. 1087 (1894); *Connelly v. W. U. T. Co.*, 100 Va. 51, 40 S. E. 618, Ga. 763, 15 S. E. 901, 30 Am. St. R. 56 L. R. A. 663 (1902); *Davis v. W. U. T. Co.*, 46 W. Va. 48, 32 S. E. 1026 183, 17 L. R. A. 430 (1892); *W. U. T. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. (1899); *Summerfield v. W. U. T. Co.*, 674, 54 L. R. A. 846 (1901), overruling *Reese v. W. U. T. Co.*, 123 Ind. 87 Wis. 1, 57 N. W. 973, 41 Am. St. R. 294, 24 N. E. 163, 7 L. R. A. 583 17 (1894); *W. U. T. Co. v. Wood*, 57 Fed. 471, 13 U. S. App. 317, 6 C. C. A. (1889); *Francis v. W. U. T. Co.*, 58 432, 21 L. R. A. 706 (1893); *Stansell v. W. U. T. Co.*, 107 Fed. 668 (1901); *W. U. Western U. T. Co. v. Sklar*, 125 Fed. 295 (1903), a case containing a valuable collection of authorities on this topic. *Connell v. W. U. T. Co.*, 116 Mo. 34, 22 S. W.

CHAPTER IV.

PARTIES TO TORT ACTIONS.

§ 1. CORPORATIONS.

124. The State May Be Plaintiff. We have seen that an action of tort cannot be maintained against the State, nor against the sovereign or diplomatic representative of a foreign State, without its permission.¹ Such action may be brought by the State, however, in its corporate capacity. Accordingly, if timber is wrongfully taken from its land, it may prosecute the wrongdoers criminally, or it may proceed against them in trover.² It may also sue another State or a public corporation created by another State for diverting or fouling streams accustomed to flow through its territory.³ Again, one State may maintain a suit against another State, formed by its consent from its territory, to determine what proportion the latter should pay of indebtedness of the former at the time of separation.^{3a}

125. Political Subdivisions of the State. At present, these are, as a rule, public corporations, with power to acquire, hold and use property, as well as to sue and be sued. It does not follow from this,^{3b} however, that they are liable to tort actions for injuries done by their officials or employees to individuals. Whether they are so liable depends upon two questions: First: What functions are they performing through their wrongdoing representatives?

1. *Supra*, ¶ 41; *Bigby v. U. S.*, 188 U. S. 400, 23 Sup. St. 468 (1902).

2. *Wooden Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398 (1882).

3. *Missouri v. Illinois*, 180 U. S. 208, 21 Sup. Ct. 331 (1900); *Kansas v. Colorado*, 185 U. S. 126, 22 Sup. Ct. 552 (1901).

3a. *Virginia v. West Virginia*, 220 U. S. 1, 31 Sup. Ct. 330 (1911). It is a quasi-international controversy to be considered in an untechnical spirit.

3b. *Markey v. County of Queens*, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46, with note (1898). By the County Law (ch. 686, L. 1892, now ch. XI of the Consolidated Laws), a county is declared to be a "municipal corporation" and "an action * * * to enforce any liability * * * shall be in the name of the county." *School District v. Williams*, 38 Ark. 454 (1882).

second: To what extent has their common-law liability been modified by statute? ⁴

126. Governmental and Private Functions. Most modern municipal corporations possess "two kinds of powers; one governmental and public, and, to the extent they are held and exercised, the corporation is clothed with sovereignty; the other private, and, to the extent they are held and exercised, it is a legal individual. The former are given and used for public purposes; the latter for private purposes. While in the exercise of the former the corporation is a municipal government, and while in the exercise of the latter it is a corporate legal individual." ⁵ When the corporation is exercising a power of the first class—is performing a purely political function—it is entitled, at common law, to the same exemption from suit that is enjoyed by the State in the performance of the same function. It is a mere "instrumentality of government," ⁶ an "agency of the State," ⁷ and the same reasons which prevent recovery from the State for injuries inflicted in its behalf by its officers or agents, should save the public corporation from actionable liability.

127. Counties, Parishes, Townships, School Districts, and similar subdivisions of the State are rarely liable for the misconduct of their officers or servants. This freedom from tort liability has been declared by some courts ⁸ to rest upon the genesis of these corporations. They are "created by the sovereign power of the State, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The organization is superimposed by a sovereign and permanent authority." Being such "involuntary incorporations organized as political subdivisions of the State for governmental purposes,

⁴ *City of Chicago v. Sturges*, 222 U. S. 313, 32 Sup. Ct. 92 (1911). For an excellent discussion of this topic, see Goodnow, *Municipal Home Rule*, chaps. vii and viii (New York, 1895).

⁵ *Lloyd v. The Mayor*, 5 N. Y. 369, 55 Am. Dec. 347 (1851); *Vilas v. Manila*, 220 U. S. 345, 356, 31 Sup. Ct. 416 (1911).

⁶ *Summers v. Davless County*, 103 Ind. 262, 2 N. E. 725 (1885).

⁷ *Jones v. City of Williamsburg*, 97 Va. 722, 34 S. E. 883 (1900).

⁸ *Commissioners of Ham. Co. v. Michels*, 7 Ohio St. 109 (1857); *Board, Etc. v. Dailey*, 132 Ind. 73, 31 N. E. 531 (1892); *Bailey v. Lawrence County*, 5 S. D. 393, 59 N. W. 219, 49 Am. St. R. 881 (1894).

they are not liable for the negligence of their officers or servants any more than the State would be liable."

128. Quasi-Municipal Corporations. Other courts have preferred to rest the non-liability of these corporations solely upon the nature of their functions. At first, these were exclusively political, or governmental. The county,⁹ the township,¹⁰ and the parish¹¹ were established for the more convenient administration of government. Their duties were public,¹² and were apportioned among them by the State with a view to the convenience and benefit of its citizens. Although certain officers were chosen by the electors of each subdivision, they were not its servants or special representatives, but officers of the public at large, and were charged with the performance of public duties, not with the conduct of the corporate affairs of the county, or the township, or the parish. Accordingly, injuries inflicted by them, in the performance of their duties, did not render the quasi corporations liable as their master.¹³

In many of our States, privileges and powers have been granted to these political subdivisions to be exercised by them for their corporate advantage. For injuries inflicted by their representatives in the exercise of such powers and privileges, their liability

9. Markey v. County of Queens, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46 (1898), containing an excellent sketch of the legal status of counties in New York. **Lefrois v. County of Monroe,** 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 206 (1900).

10. Hill v. Boston, 122 Mass. 344 (1877). On p. 349, Gray, J., says: "At the first settlement of the colony, towns consisted of clusters of inhabitants dwelling near each other, which by the effect of legislative acts designating them by name, and conferring upon them the powers of managing their own prudential affairs, electing representatives and town officers and making by-laws, and disposing, subject to the paramount control of the Legisla-

ture, of unoccupied lands within their territory, became in effect municipal or quasi corporations, without any formal act of incorporation." On p. 351 he declares: "A private action cannot be maintained against a town or other quasi corporation for a neglect of corporate duty, unless the action be given by statute."

11. Sherman v. Parish of Vermilion, 51 La. Ann. 880, 25 So. 538 (1899), tracing the history of the parish in Louisiana.

12. Russell v. The Men of Devon, 2 Durn. & E. 667 (1788).

13. Cases cited in the last seven notes; also, Pritchard v. Commissioners of Morganton, 126 N. C. 908, 36 S. E. 353 (1900).

is that of a private corporation.¹⁴ It is to be noted, too, that modern statutes impose upon the county, the parish, and the township a duty of responding for the torts of their officers and servants, which was not imposed by common law.¹⁵ Such statutory provisions, however, are generally subjected by the courts to a strict construction.¹⁶

129. Cities, Villages, and Specially Incorporated Towns. These are often described by judges and text-writers as true municipal corporations, in contradistinction to the quasi corporations, which we have just been dealing with. They possess political or governmental powers, it is true; but they possess also many of the powers of a private corporation. As a rule, their organization is solicited by their inhabitants, for the promotion of local interests and the betterment of community conditions, quite as much as for the discharge of governmental functions. Accordingly, it is held that they are subject to an implied liability for the torts of their representatives, which does not attach to the quasi corporation. If those torts are inflicted in connection with the business affairs of the municipality, the persons harmed are not required to show a statute expressly imposing liability upon it; they are entitled to recover against it, whenever a recovery would be allowed against a private corporation.

For example, a city engages in carrying on gas works,¹⁷ or water works,¹⁸ or in the ownership and management of wharves,¹⁹ or in

14. *Moulton v. Scarborough*, 71 Vt. 101, 222 U. S. 313, 32 Sup. Ct. Me. 267, 36 Am. R. 308 (1880); 92 (1911).

Waldron v. Haverhill, 143 Mass. 582, 10 N. E. 481 (1887); *Collins v. Greenfield*, 172 Mass. 78, 51 N. E. 454 (1898); *Butman v. Newton*, 179 Mass. 16, 60 N. E. 401 (1901); *Hanson v. St. Louis Co.*, 62 Mo. 313 (1876); *Johnson v. City of Somerville*, 195 Mass. 370, 8 N. E. 268, 10 L. R. A., N. S. 715 (1907). 16. *Bartram v. Sharon*, 71 Conn. 686, 43 At. 143, 46 L. R. A. 144 (1887); *Spencer v. Freeholders of Hudson*, 66 N. J. L. 301, 306, 49 At. 483 (1901); *Chick v. Newberry Co.*, 27 S. C. 419 (1887); *Schaefer v. Fond du Lac*, 99 Wis. 333, 74 N. W. 810, 41 L. R. A. 287 (1898).

17. *Scott v. Manchester*, 2 H. & N. 204 (1857); *Shuter v. The City*, 3 Phila. (Pa.) 228 (1858). 15. *Hill v. Boston*, 122 Mass. 344 (1877); *Medina v. Perkins*, 48 Mich. 67 (1882); *Bryant v. Town of Randolph*, 133 N. Y. 70, 30 N. E. 657 (1892); *McCalla v. Multunoh Co.*, 3 Ore. 424 (1869); *City of Chicago*, 149 Mass. 410, 21 N. E. 871, 14 Am. St. R. 430 (1889); *Bailey v.*

18. *Logansport v. Dick*, 70 Ind. 65, 36 Am. R. 308 (1880); *Stock v. Boston*, 149 Mass. 410, 21 N. E. 871, 14 Am. St. R. 430 (1889); *Bailey v.*

the towing of vessels,²⁰ for profit. It must respond in damages for the wrongs of its officers, agents or servants, provided these wrongdoers were acting within the scope of their apparent authority, or their misconduct has been ratified by the municipality. In other words, their liability depends upon the rules relating to master and servant, which we shall consider hereafter.

While this doctrine is generally accepted by the courts, they have experienced no little difficulty in applying it. Many activities of the modern municipality have at once a private and a public character. They minister to the public welfare as well as contribute to the private benefit of the corporation. In conducting them, the city or village is discharging a governmental function as a deputy of the State, while it is also relieving the inhabitants of the locality of a burden they would otherwise be compelled to bear as individuals. An example of this class is the work of the street cleaning department. In view of its mixed character, it is not surprising that some courts hold the municipality liable²¹ for the torts of this department's officers and servants, while other courts hold that it is not liable.²²

130. Non-Liability of City. There is substantial agreement that it is not liable for the torts of its fire²³ or police²⁴ depart-

Mayor, 3 Hill (N. Y.) 531, 38 Am. S. E. 29 (1894); *McFadden v. Jewell*, Dec. 669 (1842); *Aldrich v. Tripp*, 119 Ia. 321, 93 N. W. 302 (1903); 11 R. I. 141, 23 Am. R. 434 (1875); *Condict v. Jersey City*, 46 N. J. L. City of Winona v. Botzet, 169 Fed. 157 (1884); *Connelly v. Nashville*, 321, 94 C. C. A. 563 (1909). 100 Tenn. 262, 46 S. W. 565 (1898).

19. *Kennedy v. Mayor, Etc. of New York*, 73 N. Y. 365 (1878); *Willey v. Alleghany*, 118 Pa. 490 (1888); *City of Petersburg v. Applegart*, 28 Gratt. (Va.) 321, 26 Am. R. 387 (1877). 22. *Wilcox v. Chicago*, 107 Ill. 334, 47 Am. R. 434 (1883); *Saunders v. City of Ft. Madison*, 111 Ia. 102, 82 N. W. 428 (1900); *Davis v. Lebanon*, 108 Ky. 698, 57 S. W. 471 (1900); *Burrill v. Augusta*, 78 Me. 118, 3 At. 177 (1886); *Grube v. St. Paul*, 34 Minn. 402, 26 N. W. 228 (1886);

20. *City of Philadelphia v. Gavagnin*, 62 Fed. 617 (1894). *Heller v. Sedalia*, 53 Mo. 159, 14 Am. R. 444 (1873); *Alexander v. Vicksburg*, 68 Miss. 564, 10 So. 62 (1891);

21. *Barney Dumping Boat Co. v. New York*, 40 Fed. 50 (1889); *Quill v. Mayor, Etc.*, 55 N. Y. Supp. 889, 36 App. Div. 476 (1899); *Missano v. Mayor*, 160 N. Y. 123, 54 N. E. 744 (1899). *Gillespie v. Lincoln*, 35 Neb. 34, 52 N. W. 811, 16 L. R. A. 349 (1892); *Smith v. Rochester*, 76 N. Y. 506

22. *Love v. Atlanta*, 95 Ga. 129, 22 (1879); *Frederick v. Columbus*, 58

ments, nor for those of its boards of health²⁵ or of education;²⁵ nor for those of any other officers, agents or servants in the discharge of functions, which primarily belong to the State, but the performance of which it has delegated to the municipality, such as keeping highways in repair.^{26a} In some jurisdictions, however, municipal corporations are held liable for defective highways, on the theory that they have agreed, expressly or impliedly, for a consideration received from the sovereign power to keep the highways in repair.^{26b} Neglect of officers in guarding prisoners,²⁷ or in caring for jurymen,²⁸ or in keeping court houses, town houses, jails and other public buildings in repair,²⁹ will not subject the corporation to legal liability. Nor will the negligence of an em-

Ohio St. 538, 51 N. E. 35 (1898); *City of Richmond v. Long*, 17 Gratt. Fire Ins. Patrol v. Boyd, 120 Pa. 624. 375, 94 Am. Dec. 461 (1867).

15 At. 553, 1 L. R. A. 417 (1888); *26. Hill v. Boston*, 122 Mass. 344 (1887); *Ford v. School District*, 121 Pa. 543, 15 At. 812, 1 L. R. A. 607 (1888); *Wixon v. Newport*, 13 R. I. 454 (1881); *Folk v. City of Milwaukee*, 108 Wis. 359, 84 N. W. 420 (1900). In *Workman v. Mayor*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314 (1900), the Supreme Court of the United States held the city liable in an admiralty proceeding, although admitting that the city was not liable at common law. Both the prevailing and dissenting opinions are worthy of careful study.

26a. Smith v. City of Gloucester, 201 Mass. 329, 87 N. E. 626 (1909).

26b. McMullen v. City of Middletown, 187 N. Y. 37, 45, 79 N. E. 863, 11 L. R. A., N. S. 391 (1907); *Conrad v. Trustees of Ithaca*, 16 N. Y. 158 (1857); *Weet v. Trustees of Brockport*, 16 N. Y. 161, note (1856); *Workman v. New York City*, 179 U. S. 552, 21 Sup. Ct. 212 (1900), dissenting opinion of Gray, J.

27. Davis v. Knoxville, 90 Tenn. 599, 18 S. W. 254 (1891).

28. Sherman v. Parish of Vermilion, 51 La. Ann. 880, 25 So. 538 (1899).

29. Kincaid v. Harden Co., 53 Ia. 430, 5 N. W. 589 (1880); *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302 (1858).

25. Nicholson v. City of Detroit, 129 Mich. 246, 88 N. W. 695 (1902);

24. Masters v. Bowling Green, 101 Fed. 101 (1899); *Bartlett v. City of Columbus*, 101 Ga. 300, 28 S. E. 599, 44 L. R. A. 795, with note (1897); *Lahner v. Williams*, 112 Ia. 428, 84 N. W. 506 (1900); *Craig v. City of Charleston*, 180 Ill. 154, 54 N. E. 184 (1899); *Butterick v. Lowell*, 1 Allen (Mass.), 172, 79 Am. Dec. 721 (1861); *Tomlin v. Hildreth*, 65 N. J. L. 438, 47 At. 649 (1900); *Petersfield v. Vickers*, 3 Cold. (43 Tenn.) 205 (1866); *Hathaway v. City of Everett*, 205 Mass. 246, 91 N. E. 296 (1910).

ployee of a charity hospital render the city, which maintains it, liable to damages.³⁰

131. Legislative, Judicial and Quasi-Judicial Powers. As a rule, a municipality is not liable in tort for the nonfeasance or the misfeasance of its officers, in the exercise of these powers.^{30a} Hence, the failure of a city council to pass ordinances prohibiting the use of sidewalks by bicycles,³¹ or the use of streets for coasting,³² or providing for the suppression of nuisances,³³ will not subject the city to a tort action. Nor will it be liable for injuries done to individuals by the enforcement of unconstitutional and void ordinances,³⁴ except where these are enacted for the private benefit of the corporation.³⁵ The blunders or even the willful misconduct of its judicial officers cannot be charged to its account:³⁶ nor will it be made to respond in damages for injuries caused by mistaken plans for street sewers and similar works,³⁷ nor for negligence in constructing them.^{37a}

30. *Maxmillian v. Mayor, Etc.*, 62 N. Y. 160, 20 Am. R. 468 (1876); *Tarbutton v. Tenville*, 110 Ga. 90, 35 S. E. 282 (1899).

30a. *O'Donnell v. City of Syracuse*, 184 N. Y. 1, 9, 76 N. E. 738, 3 L. R. A., N. S. 1053 (1906).

31. *Jones v. City of Williamsburg*, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294 (1900); *contra*, *Hagerstown v. Klotz*, 93 Md. 437, 49 At. 836, 54 L. R. A. 940 (1901).

32. *City of Lafayette v. Timberlake*, 88 Ind. 330 (1882); *contra*, *Taylor v. Mayor*, 64 Md. 68, 54 Am. R. 759 (1885); *Cochrane v. Mayor of Frostburg*, 81 Md. 54, 31 At. 703, 43 Am. St. R. 479, 27 L. R. A. 728 (1895). These cases proceed upon the theory that the duty to prevent nuisances is imperative, not legislative or discretionary.

33. *James v. Harrodsburg*, 85 Ky. 191, 3 S. W. 135 (1887); *Cain v. Syracuse*, 95 N. Y. 83 (1884); *Leonard v. Hornellsville*, 41 App. Div.

106, 58 N. Y. Supp. 266 (1899); *McDade v. Chester City*, 117 Pa. 414, 12 At. 421, 2 Am. St. R. 681 (1888); *Smith v. Selings-grove Borough*, 199 Pa. 615, 49 At. 213 (1901); *Hubbell v. City of Viroqua*, 67 Wis. 343, 30 N. W. 847 (1886).

34. *Taylor v. City of Owensboro*, 98 Ky. 271, 32 S. W. 948 (1895).

35. *McGraw v. Town of Marion*, 98 Ky. 673, 34 S. W. 18, 47 L. R. A. 593 (1896).

36. *Duke v. Rome*, 20 Ga. 635 (1856); *Gray v. Griffin*, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131 (1900).

37. *City of Chicago v. Seben*, 165 Ill. 37, 46 N. E. 244 (1897); *Mills v. City of Brooklyn*, 32 N. Y. 489 (1865); *Hughes v. City of Auburn*, 161 N. Y. 96, 55 N. E. 389 (1899). Cf. *Stone v. City of Seattle*, 30 Wash. 65, 70 Pac. 249, 67 L. R. A. 253 (1902), holding the city liable for damages caused by defect in plan of sidewalk, and repudiating the doc-

Moreover, it is not responsible for an abuse by its officers of a discretionary power vested in them by law, such as the appointment of unfit men to office.³⁸

132. Statutory Liability of Municipal Corporations. In the absence of constitutional prohibitions, the State may impose upon public corporations of every kind, any of the liabilities from which they are free at common law.^{38a} Whether such a liability has been imposed in a particular case depends upon the existence and the construction of statutory enactments. If the terms of the statute are clear and unequivocal, there is no difficulty; but oftentimes the legislature does not impose a liability in express terms, while its language indicates an intent to impose it. The canon of construction to be applied in such a case in England has been judicially stated as follows: "In the absence of something to show a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same thing."³⁹

In this country, various canons of construction have been suggested,⁴⁰ but that which seems to be sustained by the weight of authority, as well as by sound legal principle, is this; In the absence of an express statement of its intention, the legislature must be presumed to impose upon a public corporation liability for injuries inflicted by its officers or servants, within the scope of their authority, when the authority given or the duty enjoined by statute relates to the local or special interests of the corporation, and is ministerial or imperative, and ample means are provided for the exercise of the authority or the performance of the duty.⁴¹

trine that the duty of devising a proper plan is quasi judicial. *Trustees v. Gibbs*, L. R. 1 H. L. 93, 110, 35 L. J. Exch. 225 (1866).

^{37a.} *Smith v. Commissioners, Etc.* of Louisville, 146 Ky. 562, 143 S. W. 244, 23 Am. R. 332 (1877); *Detroit v. Blakeby*, 21 Mich. 84 (1870); 3, 38 L. R. A., N. S. 151 (1912).

^{38.} *Craig v. City of Charleston*, 180 Ill. 154, 54 N. E. 184 (1889). *Weet v. Brockport*, 16 N. Y. 161, note (1857). See the very full note

^{38a.} *City of Vancouver v. Cummings*, 46 Can. Sup. Ct. 457, 26 Ann. R. A. 253-271. to *Stone v. City of Seattle*, in 67 L.

Cas. 685 (1912). ^{41.} 2 Dillon, *Municipal Corporations* (4th Ed.), §§ 967, 980-983, and

^{39.} *Blackburn, J., in Mersey Dock* authorities cited.

133. Liability of Municipality as Property Owner. For the wrongful use and management of property which it holds and enjoys in its private corporate capacity, or for the proper management of which it is made liable by statute, it is subject to the same liability that attaches to individual ownership.⁴² Such is not the rule, however, in the case of property acquired and controlled by it for the public, or in the discharge of governmental functions.⁴³ Still, if such property is so used as to become a private nuisance to adjoining property owners, the corporation may be liable for the damages inflicted,⁴⁴ unless its conduct is constitutionally authorized by the State.⁴⁵ It seems to be well settled in most jurisdictions that a public corporation may be liable for trespass and other injuries directly inflicted, while not liable for consequential damages.⁴⁶

134. Liability of Municipal Officers and Servants. In many cases where the municipal corporation escapes liability, under the rules which we have been considering, the injured party is not without redress. If the wrongdoing officers or servants were performing executive or ministerial functions, as distinguished from those that are judicial, or quasi-judicial, they are personally liable to those who have sustained legal harm.⁴⁷

42. *Brown v. Atlanta*, 66 Ga. 71 (1880); *Moulton v. Scarborough*, 71 Me. 267 (1880); *Thayer v. Boston*, 19 Pick. (Mass.) 511 (1837); *Mackey v. Vicksburg*, 64 Miss. 777, 2 So. 178 (1887); *Carrington v. St. Louis*, 89 Mo. 208, 1 S. W. 240 (1886).

43. *Hill v. Boston*, 122 Mass. 344, 23 Am. R. 332 (1877), and cases cited supra, ¶ 126.

44. *Platt Brothers & Co. v. Waterbury*, 72 Conn. 531, 45 At. 154, 48 L. R. A. 691, and note (1900); *Winchell v. Waukesha*, 110 Wis. 101, 85 N. W. 668 (1901).

45. *Marcus Sayre Co. v. Newark*, 60 N. J. Eq. 361, 45 At. 985, 48 L. R. A. 722 (1900); *Valparaiso v. Hagen*, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707 (1899); *Lefrois v. County of*

Monroe, 162 N. Y. 563, 57 N. E. 185 (1900); *Smith v. Sedalia*, 152 Mo. 283, 53 S. W. 907 (1899). The Constitution of Missouri prohibits the taking or damaging of private property for public use, without compensation. Hence the city was held liable.

46. *Hughes v. City of Auburn*, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 630 (1892); 2 *Dillon Mun. Corp.* (4th Ed.), § 987. In *City of Radford v. Clark*, 113 Va. 199, 73 S. E. 571, 38 L. R. A., N. S. 281 (1912), the corporation escaped liability because the work it was carrying on was authorized by its charter.

47. *School District v. Williams*, 38 Ark. 454 (1882); *Tomlin v. Hildreth*, 65 N. J. L. 438, 47 At. 649 (1900);

135. Charitable Corporations. When these institutions are a part of the governmental machinery of the State, or of one of its political subdivisions, they are not liable for the torts of their officers or servants. The same reasons which exempt the municipality exempt them.⁴⁸

Frequently, however, they are founded by the gifts of individuals, and are not in any sense State institutions. In such circumstances, what is their liability? It must be admitted that the judicial answers are quite at variance.⁴⁹ They fall into three classes, in this country. According to one class, the liability is that of the ordinary private corporation.⁵⁰ According to another class, there is no corporate liability for the negligence of the officers or servants. If there were, say these courts, the trust funds of the corporation would be diverted from the purposes to which they were devoted by the donors. Charitable bequests would be thwarted, and trustees, by their negligence, or other wrongdoing, would be able to waste the funds which have been dedicated to

Bennett v. Whitney, 94 N. Y. 302 (1884); *Lefrois v. County of Monroe*, 162 N. Y. 563, 57 N. E. 185 (1900); *semble. Workman v. New York*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314 (1900); *County of Mecklenburg v. Beales*, 111 Va. 691, 69 S. E. 1032, 36 L. R. A., N. S. 285 (1911), with note on liability of public officer for loss of funds.

48. *Williamson v. Louisville Industrial School*, 95 Ky. 251, 24 S. W. 1065, 23 L. R. A. 200, 44 Am. St. R. 243 (1894); *Perry v. House of Refuge*, 63 Md. 20, 52 Am. R. 495 (1885); *MacDonald v. Massachusetts Hospital*, 120 Mass. 432, 21 Am. R. 529 (1876); *Overholser v. Nat. Home, Etc.*, 68 Ohio St. 286, 67 N. E. 487 (1903); *Maxmillian v. Mayor, Etc. of New York*, 62 N. Y. 160 (1875); *Richmond v. Long*, 17 Grat. (Va.) 375, 94 Am. Dec. 461 (1867).

not received an authoritative answer. 1 Beven on Negligence (2d Ed.) 290.

50. *Donaldson v. Commissioners*, 30 New Brunswick, 279 (1890); *Gla- vin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. R. 675 (1879). In the last cited case, Durfee, C. J., in reply to the argument that if such corporations are held liable for the negligence of their physicians or attendants, people will be discouraged from contributing to their support, says: "The public is doubtless interested in the maintenance of a great public charity, such as the Rhode Island Hospital is; but it is also interested in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully, and therefore it has an interest against exempting any such person or corporation from liability for its negligence."

49. In England, the question has

charitable purposes. Those who accept the ministrations of such establishments, it is declared, assent to the condition imposed by law, that they shall look to the individual wrongdoers for redress of wrongs done to them by the officers, agents or employees. The wrongdoer, but not the trust fund, must respond in damages.⁵¹

The intermediate view, and that which seems to be supported by the weight of authority as well as by the weight of argument, is, that a charitable organization is not liable in tort for injuries done by physicians, employees or servants, when it has exercised due care in their selection,⁵² but that it is liable for corporate misconduct or negligence.⁵³ Total immunity is denied.^{53a}

136. What Organizations are Charitable? The distinguishing characteristics of these institutions are: First: Their origin, in the donations of benevolent persons or in grants from the State. Second: The manner in which they are conducted—not for the pecuniary profit of their managers or owners, but for the promotion of the welfare of others.⁵⁴ A railroad or steamship company, which maintains a hospital for the gratuitous treatment of its injured or sick employees, or provides a surgeon for the gratuitous treatment of passengers, is subject to the rule governing charitable corporations. It is liable only for failure to use

51. *Downes v. Harper Hospital*, 101 Mich. 555, 45 Am. St. R. 427, 60 N. W. 42 (1894); *Insurance Patrol v. Boyd*, 120 Pa. 624, 15 At. 553, 6 Am. St. R. 745, 1 L. R. A. 417 (1888); *Abston v. Waldon Academy*, 118 Tenn. 24, 102 S. W. 351, 11 L. R. A. N. S. 1179 (1906).

52. *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 At. 595, 31 L. R. A. 224 (1895); *Powers v. Mass. Hospital*, 109 Fed. 294, 47 C. C. A. 122, and note (1901); *Conner v. Sisters of the Poor*, 10 Ohio S. C. P. Dec. 86, 7 Ohio N. P. 514 (1900); *Corbett v. St. Vincent's Industrial School*, 79 App. Div. (N. Y.) 334 (1903); *Farrigan v. Pevear*, 193 Mass. 147, 78 N. E. 855, 7 L. R. A. N. S. 481, 118 Am. St. R. 484 (1906).

53. The first two cases in the preceding note. In *Herr v. Central Ky. Asylum*, 97 Ky. 458, 30 S. W. 971, 28 L. R. A. 394 (1895), an injunction was granted against a charitable corporation for a nuisance as this would not deplete the funds, although damages, it was said, should not be awarded.

53a. *Hordern v. Salvation Army*, 199 N. Y. 233, 92 N. E. 626, 32 L. R. A. N. S. 62 (1910).

54. *Sherman v. Cong. Miss. Soc.*, 176 Mass. 349, 57 N. E. 702 (1900); *Corbett v. St. Vincent's Industrial School*, 79 App. Div. (N. Y.) 334 (1903); *affd.* in 177 N. Y. 16, 68 N. E. 997 (1903).

reasonable care in selecting surgeons, nurses, and other assistants.⁵⁵ The fact that those receiving treatment make contributions to the hospital or similar institution, will not change its character,⁵⁶ unless these contributions are required and received as a source of profit to the proprietors.⁵⁷ It has been held that a Young Men's Christian Association is not a public charitable organization. "The report shows," said the court, "that while much of the work of the defendant corporation is of a charitable nature, its purposes are also social, and include the giving of lectures, and of theatrical and other entertainments for the benefit of its members." Hence, the court declared, it was not entitled to exemption from liability for the negligence of its servants.⁵⁸ The same holding was made in the case of a hospital conducted for profit, in connection with a medical school.^{58a}

137. Private Corporations. These may sue and be sued for torts, and the rules which govern such actions are substantially those which apply to like actions by or against natural persons.⁵⁹

Such corporation is entitled to sue for damages inflicted by a libel, provided the defamation is against it as an artificial person,⁶⁰ and not against its officers or agents as individuals.⁶¹

Its liability for torts was formerly denied, or confined to narrow limits. This denial appears to rest upon a dictum of Thorpe, C. J.,⁶² which was misunderstood. "In terms it applied to munic-

55. *Elghmy v. Ry. Co.*, 93 Ia. 538, 61 N. W. 1056, 27 L. R. A. 296 (1895); *Galveston, etc., Ry. v. Hanway* (Tex. Civ. App.), 57 S. W. 695 (1900); *Laubheim v. DeKoninglyke, etc., Co.*, 107 N. Y. 228, 13 N. E. 781, 1 Am. St. R. 815 (1887); *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 194, 96 N. E. 406, 38 L. R. A. N. S. 481 (1911).

56. *Richardson v. Coal Co.*, 10 Wash. 648, 39 Pac. 95 (1895).

57. *Hanway v. Galveston, etc., Ry.*, 94 Tex. 76, 58 S. W. 724 (1900).

58. *Chapin v. Holyoke Y. M. C. A.*, 165 Mass. 280, 42 N. E. 1130 (1896).

58a. *University of Louisville v. Hammock*, 127 Ky. 564, 106 S. W. 219, 14 L. R. A. N. S. 784 (1907).

59. *Phil. W. & B. Ry. v. Quigley*, 21 How. (62 U. S.) 202 (1858).

60. *Martin County Bank v. Day*, 73 Minn. 195, 75 N. W. 1115 (1898); *Trenton Mutual Life, etc., Co. v. Perrine*, 23 N. J. L. 402 (1852); *Morrison Jewell Co. v. Lingane*, 19 R. I. 316, 33 At. 452 (1895).

61. *Mayor of Manchester v. Williams* (1891), 1 Q. B. 94, 60 L. J. Q. B. 23.

62. 29 Ass. f. 100, Pl. 67 quoted in *Bro. Abr. Corporations*, 43.

ipal corporations only," but many writers and judges treated it as applicable to all corporations aggregate.⁶³ It is now well settled, however, that if a corporation has no body to be seized by *capias* or *exigent*, it has property which may be attached or levied upon.⁶⁴ Some eminent judges have declared that it is not liable for a tort which involves actual malice.⁶⁵ Their view is that a corporation aggregate has not a "mind," and, therefore, cannot entertain malice. "If malice in law," said an English judge in rejecting this view, "were synonymous with malice in French—a sort of *esprit* tinged with ill-nature, I should entirely agree. In such a sense a corporation would be as incapable of malice as of wit. But of actual malice in a legal sense, I think a corporation is capable."⁶⁶ This is the prevailing view both in England and in this country. Accordingly, a corporation is liable for malicious prosecution,⁶⁷ or for libel,⁶⁸ or for fraud,⁶⁹ although the malicious acts were done, as of course they could only be done, by its agent or servant; provided, those acts were done in the course and within the apparent scope of his authority in the business of his principal; and provided further, that, if the acts were not strictly within the corporate powers, they were assumed to be performed for the corporation, and by one who was competent to employ the corporate powers actually exercised.⁷⁰

63. See note by Serj. Manning, in 98 N. C. 34, 3 S. E. 923, 2 Am. St. R. 4 Man. & G. at pp. 453-455. 312 (1887), *semble*.

64. *Maund v. Monmouthshire Canal Co.*, 4 Man. & G. 452, 11 L. J. C. P. 317, 2 Dowl. N. S. 113, 5 Scott N. R. 457 (1842), trespass for breaking and entering locks on a canal; *Central of Ga. Ry. v. Brown*, 113 Ga. 414, 38 S. E. 989, 84 Am. St. R. 250 (1901).

65. Baron Alderson, in *Stevens v. Midland Counties Ry.*, 10 Ex. 352 (1854); Lord Bramwell, in *Abrath v. N. E. Ry.*, 11 App. Cas. 247, 55 L. J. Q. B. 457 (1886).

66. *Cornford v. Carlton Bank* (1899), 1 Q. B. 392.

67. *Cornford v. Carlton Bank* (1901), 1 Q. B. 22, 68 L. J. Q. B. 1020. *Hussey v. Norfolk, etc., Ry.*, 98 N. C. 34, 3 S. E. 923, 2 Am. St. R. 312 (1887), *semble*.

68. *Fogg v. Boston, etc., Ry.*, 148 Mass. 513, 20 N. E. 100, 12 Am. St. R. 583 (1889); *Hussey v. Norfolk, etc., Ry.*, 98 N. C. 34, 3 S. E. 923, 2 Am. St. R. 312 (1887); *Miss. Pac. Ry. v. Richmond*, 73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280 (1889); *Barwick v. English J. S. Bank*, L. R. 2 Ex. 259, 36 L. J. Ex. 147 (1867); *Citizen's Life A. Co. v. Brown* (1904), A. C. 423, 73 L. J. P. C. 102.

69. *Fitzgerald v. Fitzgerald Co.*, 41 Neb. 374, 59 N. W. 838 (1894); *Erie City Iron Works v. Barber*, 106 Pa. 125 (1884).

70. *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296 (1898).

138. Liability for Slander. The suggestion has been made that a corporation is not liable for slander spoken by its agents.⁷¹ It is believed that there is no judicial decision declaring such doctrine,^{71a} while there are numerous judicial dicta to the contrary.⁷² The view seems to rest upon the idea that as a corporation has no voice it cannot commit slander. Such a notion belongs to the same category with those which have been exploded: that a corporation has no body, and hence cannot commit a trespass; that it has no mind, and hence can entertain no malice. It can speak only through its agents; and their voice, when used in compliance with its orders, or with its approval,⁷³ or, it is submitted, within the scope of their authority as its agents, is its voice.

In the language of a recent decision: "Inasmuch as a corporation must transact its business and perform its duties through natural persons, it is now well settled that a corporation is liable in damages for slander, as it is for other torts."^{73a} And the latest

71. Townshend, Slander and Libel v. Bowery Bank, 24 A. D. 63, 48 N. Y. Supp. 978 (1897).

72. Palmeri v. Man. Ry. Co., 133 N. Y. 261, 30 N. E. 1001 (1892). Neither case deals with this question. The holding of each is that if an agent publishes a libel or a slander he is personally liable therefor. To infer from these decisions, that a corporation is not liable for slander uttered by its authorized agents, is warranted only upon the theory, that a principal is never liable in tort for his agent's acts, if the agent is personally liable.

71a. Duquesne Distrib. Co. v. Greenbaum, 135 Ky. 182, 121 S. W. 1026, 24 L. R. A. N. S. 955, 21 Ann. Cas. 481; Stewart Dry Goods Co. v. Henschker, 148 Ky. 228 (1912), limit the corporation's liability for slander to that of its principal officers, unless the slander was actually authorized or ratified. Cf. **Kaul v. Boston Mut. L. Ins. Co., 200 Mass. 265, 86 N. E. 302 (1908); Eichner**

72. Palmeri v. Man. Ry. Co., 133 N. Y. 261, 30 N. E. 1001 (1892). Action was for false imprisonment accompanied by slanderous words, and recovery was sustained. **Hussey v. Norfolk, etc., Ry., 98 N. C. 34, 3 S. E. 923, 2 Am. St. R. 312 (1887).**

73. Behre v. National Cash Reg. Co., 100 Ga. 213, 27 S. E. 986, 62 Am. St. R. 320 (1896), dictum adopting statement of Odgers on Libel & Slander (1 Am. Ed. 368, 3 Eng. Ed. 435), that a corporation is not liable for slander uttered by its officers, unless the corporation ordered and directed the utterance of the very words.

73a. Waters-Pierce Oil Co. v. Bridwell (Ark.), 147 S. W. 64 (1912), and cases cited, including **Hypes v. Southern Ry., 82 S. C. 315, 64 S. E. 395, 21 L. R. A. N. S. 873, 17 Ann. Cas. 620 (1908).**

English cases make no distinction between a corporation's liability for libel and for slander by its servants.^{73b}

§ 2. MEMBERS OF THE FAMILY.

139. Married Women. The common law did not permit a married woman to sue or be sued alone. If she were a proper party to the action, her husband must be joined with her. For torts committed by her in his presence or by his order,⁷⁴ or at least under his coercion,⁷⁵ he alone was responsible, and suit was properly brought against him alone. The rule, requiring him to be joined as a party with the wife, in other tort actions, rested upon the fact that he was entitled to her property. Unless he could be made a party defendant, one who had suffered wrong at the hands of the wife would be without remedy.⁷⁶ On the other hand, any recovery for injury to his wife's person or estate would belong to the husband, and should be prosecuted by him,⁷⁷ either as sole plaintiff,⁷⁸ or joined with his wife.⁷⁹ If the cause of action were one which

73b. *Finburg v. Moss Empires* (1908), Scotch Sess. Cas. 928; *Glasgow Corporation v. Lorimer* (1911), A. C. 209, 214, 80 L. J. P. C. 175.

74. 2 Kents' Commentaries, 149; *Dailey v. Houston*, 58 Mo. 361 (1874); *Edwards v. Wessinger*, 65 S. C. 161, 43 S. E. 518 (1903).

75. *Marshall v. Oakes*, 51 Me. 308 (1864); *Handy v. Foley*, 121 Mass. 259 (1876); *Kosminsky v. Goldberg*, 44 Ark. 401 (1884).

76. *Hawk v. Harman*, 5 Binney (Pa.) 43 (1812); *Head v. Briscoe*, 5 Car. & P. 484 (1833); *Capel v. Powell*, 17 C. B. N. S. 743 (1864), said Earle, C. J., at p. 748: "Seeing that all her personal property is vested in the husband it would be idle to sue the wife alone, the action would be fruitless."

In some cases the view has been expressed that the common law required the husband to be joined, because the wife had in law no sepa-

rate existence, and torts committed by her were his torts. *Flesh v. Lindsay*, 115 Mo. 1, 21 S. W. 907, 37 Am. St. R. 374 (1892); *Wainford v. Heyl*, L. R. 20 Eq. 321, 324 (1875). But this is inconsistent with the established doctrine that after divorce, the husband cannot be sued for torts of the wife during coverture, *Capel v. Powell*, 17 C. B. N. S. 743 (1864), as well as with the doctrine, that for her personal torts, "such as assault and battery, libel, slander and the like," judgment could be rendered against her jointly with her husband. *Flesh v. Lindsay*, supra (115 Mo. at pp. 13, 14 and cases cited).

77. Pollock, *Torts* (6th Ed.), p. 56, (9th Ed.), p. 59.

78. *Smith v. City of St. Joseph*, 55 Mo. 456 (1874).

79. *Laughlin v. Eaton*, 54 Me. 156 (1866).

would die with the person, the death of the wife, even after action brought by the husband with her, was good ground for arresting judgment in his favor.⁸⁰ The husband could not join a cause of action in his own right for a tort to himself, with one as co-plaintiff with his wife for a tort to her. Accordingly, if A slandered both husband and wife, the husband was required to bring an action in his own behalf, and a distinct action as co-plaintiff with the wife for the slander to her.⁸¹

140. Modern Legislation. In nearly every jurisdiction, statutes have been passed modifying the husband's common law rights to his wife's property and his marital authority. As a rule, this legislation has been strictly construed, so far as its effect upon the doctrines which we have been considering is concerned. Its primary object was to exempt the wife's property from the husband's control and from liability for his debts, not to exempt him from his common law liability for her torts.⁸² Hence, his liability continues, save where the statute expressly changes it, as by declaring that he shall not be liable for her wrongful or tortious acts.⁸³

80. *Stroop v. Swarts*, 12 Ser. & R. (Pa.) 76 (1824). So, if the action were brought against the husband and wife for her tort, his death would not abate the action. *Douge v. Pearce*, 13 Ala. 127 (1845); *Smith v. Taylor*, 11 Ga. 20 (1852); *Baker v. Braslin*, 16 R. I. 635; but her death would, *Willis, J., in Wright v. Leonard*, 11 C. B. N. S. 258 at p. 266 (1861); *Rapallo, J., in Kowing v. Manly*, 49 N. Y. 192, at p. 201, 10 Am. R. 346 (1872).

81. *Ebersoll v. Krug*, 3 Binney (Pa.) 555 (1811). On the other hand, if the husband and wife slandered plaintiff, he could not join the action against the husband for his slander with that against husband and wife for her slander. *Penters v. England*, 1 McCord Law (S. C.) 14 (1821); *Malone v. Stillwell*, 15 Abb. Pr. 421 (1863).

82. *Seroka v. Kaltenburg*, 17 Q. B. D. 177 (1886); *Henley v. Wilson*, 137 Cal. 273, 70 Pac. 21, 58 L. R. A. 941, 92 Am. St. R. 160 and note (1902); *McElfresh v. Kerkendall*, 36 Ia. 224 (1872); *Wolf v. Bauereis*, 72 Md. 481, 19 At. 1045, 8 L. R. A. 680 (1890). Such legislation does not relieve the wife from the necessity of joining her husband as plaintiff in a suit for injuries to her person. *Hill v. Duncan*, 110 Mass. 238 (1872); *Morgan v. Kennedy*, 62 Minn. 348, 64 N. W. 912, 54 Am. St. R. 647, 30 L. R. A. 521 and note (1895); *Flesh v. Lindsay*, 115 Mo. 1, 21 S. W. 907, 37 Am. St. R. 374 (1893); *Fitzgerald v. Quann*, 109 N. Y. 441, 17 N. E. 354 (1888).

83. *Strouse v. Leliff*, 101 Ala. 433, 14 So. 667, 46 Am. St. R. 122 (1893); *Austin v. Cox*, 118 Mass. 58 (1875), applying c. 312, St. of 1871, that a

A different view of these statutes obtains in some States, and they have been held to abolish by implication the common law rule of a husband's liability for his wife's torts. As they have destroyed the common-law theory of legal unity of husband and wife, have secured to her the full control and sole ownership of her property, have enabled her to carry on a separate business, and accorded her "the right to control her own time," courts have declared that they have destroyed the reason for the husband's liability for her misdeeds.⁸⁴

141. Double Action for Injury to Wife. When the wife sustains a personal injury through the tort of another, two distinct rights of action may accrue against the wrongdoer; one to the wife,⁸⁵ and one to the husband. The gist of the former is the injury itself, including her "potentiality to earn for herself and her expectation of life."⁸⁶ The gist of the latter is, "the consequence of the injury, in depriving the husband of his common-law right to her

husband shall not be held liable for a wife's tort, unless he aided or encouraged it; *Burt v. McBain*, 29 Mich. 260 (1874); *Mason v. Mason*, 66 Hun (N. Y.) 386 (1892), applying statute now embodied in Domestic Relations Law, ch. 272, L. 1896, § 27: "A married woman has a right of action for an injury to her person, property or character, or for an injury arising out of the marital relation, as if unmarried. She is liable for her wrongful or tortious acts: her husband is not liable for such acts unless they were done by his actual coercion or instigation: and such coercion or instigation shall not be presumed, but must be proved." *Vocht v. Kenklence*, 119 Pa. 365, 13 At. 198 (1888); *Story v. Downey*, 62 Vt. 243, 20 At. 321 (1890).

⁸⁴. *Martin v. Robson*, 65 Ill. 132, 16 Am. R. 578 (1872); *Norris v. Corkill*, 32 Ks. 409, 4 Pac. 862, 49 Am. R. 489 (1884); *Lane v. Bryant*, 100

Ky. 138, 37 S. W. 584, 36 L. R. A. 709 (1896); *Culmer v. Wilson*, 13 Utah, 129, 44 Pac. 833, 57 Am. St. R. 713 (1896).

⁸⁵. At common law, this action must be brought in the names of the wife and husband. Such is still the rule in some jurisdictions: *Wolf v. Bauereis*, 72 Md. 481 (1890). In others, the wife may sue alone. See cases in next note.

⁸⁶. *Texas, etc., Ry. v. Humble*, 181 U. S. 57, 63, 21 Sup. Ct. 526 (1900); *Atlantic, etc., Ry. v. Dorsey*, 73 Ga. 479 (1884); *Chic., etc., Ry. v. Dunn*, 52 Ill. 260 (1869); *Pancoast v. Bunnell*, 32 Ia. 394 (1871); *Townsdin v. Nutt*, 19 Ks. 282 (1877); *Harmon v. Old Col. Ry.*, 165 Mass. 100, 42 N. E. 505 (1896); *Omaha, etc., Ry. v. Doolittle*, 7 Neb. 481 (1878); *Norfolk, etc., Ry. v. Dougherty*, 92 Va. 372, 23 S. E. 777 (1895); *Stevenson v. Morris*, 37 O. St. 10, 41 Am. R. 481 (1881).

society or services, or in imposing on him the common-law duty to care for her.”⁸⁷

In some States the damages recovered for personal injuries to the wife are “community property of the husband and wife, of which the husband has the management, control and absolute power of disposition other than testamentary.”⁸⁸

142. Tort Actions between Husband and Wife. At common law, neither spouse could maintain a tort action against the other. This rule is sometimes said to be based on the doctrine that husband and wife “being one person, one cannot sue the other.”⁸⁹ At other times, it is declared to rest upon considerations of public policy. Unless “marriage acts as a perpetually operating discharge of all wrongs between man and wife,” it is said, each party will be tempted to take all petty domestic difficulties into court. It is thought to be wiser “to draw the curtain, shut out the public gaze, leave the parties to forget and forgive.”⁹⁰

143. The Injured Spouse Is Not Without Remedy, However. In case of a serious assault and battery, the wrongdoer may be punished criminally.⁹¹ If unlawfully deprived of liberty, the victim is entitled to a writ of *habeas corpus*.⁹² There is also the resort of divorce, with the right to alimony in case of an abused wife.

144. Modern Statutes Give a Right of Action in Tort Between Husband and Wife in Some Cases. The English Married Woman’s Property Act permits the wife to sue her husband for a tort to her separate estate,⁹³ but does not accord the reciprocal privilege to him. The statutes of Iowa and Illinois authorize an action by

87. *Skoglund v. Minn. Street Ry.*, Quarnet, 1 Q. B. D. 435, 45 L. J. Q. 45 Minn. 330, 47 N. W. 1071 (1891); *B.* 277 (1876).

Smith v. City of St. Joseph, 55 Mo. 456 (1874); *Kelly v. N. Y., etc., Ry.*, 168 Mass. 308, 46 N. E. 1063 (1897); *Hyatt v. Adams*, 16 Mich. 180 (1867); *Shanahan v. City of Madison*, 57 Wis. 276 (1883); *Southern Ry. Co. v. Crowder*, 135 Ala. 417, 33 So. 335 (1902).

88. *McFadden v. Santa Anna Ry.*, 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252 (1891).

89. Blackburn, J., in *Phillips v.*

90. *Abbott v. Abbott*, 67 Me. 304, 24 Am. R. 27 (1877); *Bandfield v. Bandfield*, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757 (1898); *Strom v. Strom*, 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. N. S. 191, with note (1906).

91. *State v. Oliver*, 70 N. C. 60 (1874).

92. *Reg. v. Jackson* (1891), 1 Q. B. 671, 60 L. J. Q. B. 346.

93. 45 & 46 Vict. c. 75, § 12 (1882).

either spouse to recover his or her property from the other.⁹⁴ Such legislation has not given rise to many reported decisions, and is generally subjected to a strict construction.⁹⁵ The prevailing view is that all disabilities which the common law imposes upon husband and wife by reason of the marriage status still exist, except in so far as they have been modified or changed by express statutory enactment.⁹⁶

Still, when the statutes secure to the wife the ownership and control of her separate estate, and give her the right to sue and be sued with respect to such property, as though she were a *feme sole*, it would seem that she should be accorded all actions, both equitable and legal, which are necessary to secure her in the possession or recovery of her property, even though her husband has to be made a party defendant, and thereby becomes liable to a judgment for money. And such seems to be the doctrine of the best considered cases.⁹⁷

In some jurisdictions, she is entitled to recover from a deserting husband, according to his pecuniary ability, expenditures made by her in supporting their children and herself.^{97a}

145. Tort Liability of Infants. It has never been doubted in English law that an infant is answerable for his torts, which are unconnected with his contracts.⁹⁸ If he is very young, however,

⁹⁴ *Porter v. Goble*, 88 Ia. 565, 55 N. W. 530 (1893); *Larison v. Larison*, 9 Brad. (Ill. App.) 27 (1881).

⁹⁵ *Johnson v. Johnson*, 72 Ill. 489 (1874); *Chestnut v. Chestnut*, 77 Ill. 347 (1875); *Thompson v. Thompson*, 218 U. S. 611, 31 Sup. Ct. 111, 30 L. R. A. N. S. 1153 (1910), affg. 31 App. D. C. 537, 14 Ann. Cas. 879 (1908); wife not permitted to maintain action for assault and battery against her husband, under a statute authorizing her "to sue separately for the security, recovery, or protection of her property, and for torts committed against her as fully and freely as if unmarried."

⁹⁶ *Heacock v. Heacock*, 108 Ia. 540, 79 N. W. 353 (1899). Cf. *Abbe*

v. Abbe, 22 App. Div. 483, 48 N. Y. Supp. 25 (1897); *State ex rel. Lasserre v. Michel*, 105 La. Ann. 741, 30 So. 122 (1901).

⁹⁷ *Crater v. Crater*, 118 Ind. 521, 21 N. E. 290 (1888); *White v. White*, 58 Mich. 546, 25 N. W. 490 (1885); *Whitney v. Whitney*, 49 Barb. (N. Y.) 319 (1867); *Berdell v. Parkhurst*, 19 Hun (N. Y.) 358 (1879); *Wood v. Wood*, 83 N. Y. 575 (1881); *McKendry v. McKendry*, 131 Pa. 24, 18 At. 1078, 6 L. R. A. 506 and note (1890).

^{97a} *DeBrauwere v. DeBrauwere*, 203 N. Y. 460, 96 N. E. 722, 38 L. R. A. N. S. 508 (1911).

⁹⁸ *Y. B. 35 Hen. VI. f. 11, pl. 18* (1456), holding an infant four years

his harmful acts may fall within the category of accident, instead of that of tort.⁹⁹ The command of his parents to commit a tort will not absolve him from liability,¹⁰⁰ although it will render the parent also liable.¹

Even when this tort is connected with a contract, it ought not to be difficult to determine whether a tort action will lie against him: and yet judicial decisions are quite in conflict on this point. Undoubtedly, the courts ought not to permit a plaintiff to turn a contract obligation into a tort liability by a mere trick of pleading, and thus recover against an infant in an action *ex delicto* for what is in reality the breach of a contract, which the law permits him to repudiate. For example, an infant contracts to act as plaintiff's agent,² or as bailee of his property.³ He comes under a common-law duty to obey instructions and to exercise due skill and care in the performance of his contract. For a breach of such duty an adult may be sued in an action *ex delicto*; but if the infant is so sued, his infancy is a defense. The same proof, which would establish the cause of action in a tort suit, would have established a cause of action in a suit for breach of the contract. A release of the infant's liability for breach of the contract would operate as a release from the tort.⁴ Hence the rule of law which releases the infant from liability upon the contract must operate to release him from the alternative liability for the tort.

The same doctrine has been applied in cases for false warranty

- old liable for putting out an eye: (N. Y.) 193 (1843); *Briese v. Mahodsman v. Grisell*, Noy, 129; *Barnard v. Haggis*, 14 C. B. N. S. 45 (1863); *Neal v. Gillett*, 23 Conn. 437 (1855); *Peterson v. Haffner*, 59 Ind. 130, 26 Am. R. 81 and note (1877); *Shaw v. Coffin*, 58 Me. 254, 4 Am. R. 290 (1870); *Slkes v. Johnson*, 16 Mass. 389 (1820); *McCabe v. O'Conner*, 4 App. Div. 354, 38 N. Y. Supp. 572 (1896); *affd.* 162 N. Y. 600, 57 N. E. 1116 (1900); *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671 (1891); *Humphrey v. Douglass*, 10 Vt. 71, 33 Am. Dec. 180 and note (1838); *Hutchings v. Engel*, 17 Wis. 230 (1863).
⁹⁹ *Harvey v. Dunlop, Hill & Den.* 566.
- (N. Y.) 193 (1843); *Briese v. Ma-*
echtler, 146 Wis. 89, 130 N. W. 893, 35
 L. R. A. N. S. 574 (1911).
 100. *Scott v. Watson*, 46 Me. 362,
 74 Am. Dec. 457 (1859); *School Dist.*
v. Bragdon, 23 N. H. 507, 516 (1851);
Humphrey v. Douglas, 10 Vt. 71, 33
 Am. Dec. 180 and note (1838).
 1. *Teagarden v. McLaughlin*, 86
 Ind. 476 (1882); *Hower v. Ulrich*,
 156 Pa. 410, 27 At. 37 (1893).
 2. *Vasse v. Smith*, 6 Cranch (U. S.)
 226 (1810).
 3. *Young v. Muhling*, 48 App. Div.
 617, 63 N. Y. Supp. 181 (1900).
 4. *Bishop, Non-Contract Law*, §

by infants on the sale of goods. It has been declared that "the substantial ground of action rests on promises;" that "the assumpsit" in such cases "is clearly the foundation of the action."⁵ If the warranty is an engagement collateral to the sale contract, and proof of damage cannot be made without referring to and proving the contract, then the courts are right in holding that the infant cannot be made liable by framing the action for damages in tort.⁶

146. Deceit by Infant. If, on the other hand, the false statement as to the quality, condition or title of the article is made by the infant with knowledge of its falsity with the intention to induce the buyer to act upon it, and the latter does act upon it to his damage, we have the common-law tort of deceit, and the infant should be held liable in a tort action for damages.⁷

Certainly, the weight of authority in this country is in favor of holding the infant liable for damages caused by inducing the plaintiff to sell him goods upon credit, by false representations that he was of age,⁸ or that he intended to pay for the goods, when he did not,⁹ or by inducing the seller to deliver to him goods sold for cash by giving a check for the price, which he knew to be worth-

5. *Green v. Greenbank*, 2 Marsh. 485, 4 E. C. L. 375 (1816). This was a special action on the case. In *Howlett v. Haswell*, 4 Camp. 118 (1814), the action was assumpsit. In *Brown v. Dunham*, 1 Root (Conn.) 272 (1791), the declaration was "for fraud in the sale of a horse;" plea, that defendant was under age when the sale was made: reply, that defendant had the appearance of a man of full age and was allowed by his father to trade. Judgment—"The defendant being a minor under the care of his parent, was incapable of making a contract, therefore could not be guilty of fraud in contracting."

6. *Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659 (1865). In *Collins v. Gifford*, 203 N. Y. 465, 96 N. E. 721, 38 L. R. A. N. S. 202 (1911), there

was no allegation of any false or fraudulent representation.

7. The following language in a recent decision is applicable, it is submitted: "The right not to be led by fraud to change one's situation is anterior to and independent of the contract. The fraud is a tort. Its usual consequence is that as between the parties, the one who is defrauded has a right, if possible, to be restored to his former position." *Nat. Bank Loan Co. v. Petrie*, 189 U. S. 423, 425, 23 Sup. Ct. 512 (1902). The bank had not legal capacity to sell in this case.

8. *Fitts v. Hall*, 9 N. H. 441 (1838); *Wallace v. Morss*, 5 Hill (N. Y.) 391 (1843).

9. *Ashlock v. Vivell*, 29 Ill. App. 388 (1888).

less.¹⁰ The doctrine of these authorities is, that an infant is liable for his tort, to the extent of the loss actually sustained, although it be connected with his contract, where a recovery can be had without giving effect to his contract. "The test," it is declared, "is supplied by answer to the question: Can the infant be held liable without directly or indirectly enforcing his promise? There is no enforcement of a promise where an infant, who has been guilty of a positive fraud, is made to answer for the actual loss his wrong has caused to one who has dealt with him in good faith and has exercised due diligence. Nor does such a rule open the way for a designing man to take advantage of an infant, for it holds him to the exercise of good faith and reasonable diligence, and does not enable him to make any profit out of the transaction with the infant, because it allows him compensation only for actual loss sustained."¹¹

147. **False Representations as to Age.** In England, and in some of our States,¹² false representations as to his age by an infant do not subject him to a tort action by one who has been damaged thereby. The rule that infants are liable for their torts, it is said, "is to be applied with due regard to the other equally well settled rule that, with certain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts, but of protection from their contracts."¹³ Accordingly, in the case just cited, it was held that one who had been induced to sell goods to a minor, by his false and fraudulent representation that he was of age, could not recover either for deceit or trover, although the infant had refused to pay the agreed price because of his infancy, and had disposed of the goods to third persons unknown to plaintiff. The court declared that plaintiff could not maintain his action without showing that there was a contract, which he was induced to enter into by the defendant's fraudulent

10. *Mathews v. Cowan*, 59 Ill. 341 (1871). *Ing Assoc. v. Herman*, 33 Md. 128 (1870); *Nash v. Jewett*, 61 Vt. 501, 18 At. 47, 4 L. R. A. 561, 15 Am. St. R. 931 (1889).

11. *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. R. 53 (1886).

12. *Johnson v. Ple*, 1 Lev. 169, 1 Sid. 258, 1 Keb. 965 (1665); *Bartlett v. Wells*, 1 B. & S. 836, 31 L. J. Q. B. 57 (1862); *Monumental Build-*

13. *Slayton v. Barry*, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560 (1900).

representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question.

This reasoning ignores the fundamental doctrine that an agreement which has been procured by fraud may be treated by the defrauded party as void.¹⁴

148. Liability of Infant for Trover. The reasoning appears to ignore, also, previous decisions of the same court. As early as 1819,¹⁵ that court declared in a case where the infant had induced the plaintiff to sell and deliver goods, by the misrepresentation that he was of age, and when sued for the price successfully interposed the defense of infancy: "The basis of this contract has failed from the fault, if not the fraud, of the infant; and on that ground, the property may be considered as never having passed from, or as having revested in, the plaintiff." Accordingly, the plaintiff was allowed to maintain an action for replevin of the property.¹⁶ Again, in *Hall v. Corcoran*,¹⁷ the court ruled that an action of tort for the conversion of property is not founded on the contract under which the defendant obtained possession. It would seem to follow from those decisions, that when an infant is sued for conversion, in such a case as *Slayton v. Barry*,¹⁸ his false representations and avoidance of his contract are such a fraud upon the adult, as enables him

14. *Nolan v. Jones*, 53 Ia. 387, 5 N. W. 572 (1880); *Kilgore v. Jordan*, 17 Tex. 341, 350 (1856).

15. *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105. See *Walker v. Davis*, 1 Gray, 506 (1854), where the infant got plaintiff drunk and bought from him a cow for \$26, giving his note for the price. When sued on the note, he pleaded his infancy and defeated the action. Then plaintiff sued the infant for the conversion of the cow, and recovered. Said the court: "If the defense to the action on the contract had been one, which admitted its validity and then sought to discharge it, the judgment in the case would have concluded the parties;" but the defendant in the original action on the

note having elected to avoid the contract, "the contract never became complete: the title to the cow did not pass. The tort was not waived."

16. Similar actions of replevin were sustained in *Bennett v. McLaughlin*, 13 Ill. App. 349 (1883); *Nolan v. Jones*, 53 Ia. 387, 5 N. W. 572 (1880); *Wheeler & Wilson Co. v. Jacobs*, 2 Misc. 236, 21 N. Y. Supp. 1006 (1893); *Robinson v. Berry*, 93 Me. 320, 45 At. 34 (1899); *Neff v. Landis*, 110 Pa. 204, 1 At. 177 (1885).

17. 107 Mass. 251 (1871).

18. *Slayton v. Barry*, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560 (1900).

to treat the contract as void, and to reclaim the property if it is still in the infant's hands, or if he has disposed of it to sue him in trover. Such is the right generally accorded in this country.¹⁹

The same right is accorded in almost every jurisdiction, when an infant bailee does a positive and willful act to the property bailed, which amounts to a disaffirmance of the contract of bailment.²⁰ Hence, if an infant has money or property in his hands which he is bound to return to plaintiff, but which he willfully converts to his own use, he is liable in tort;²¹ while if, by the transaction, he becomes a debtor only to the plaintiff,²² or his loss of the property is due to negligence or disobedience of orders and not to willful misconduct,²³ a tort action is not maintainable.

149. Infant's Liability for Negligence. As soon as a minor becomes capable of exercising care towards others, he is liable for negligence,²⁴ although regard is always to be had for the rule that

19. *Ashlock v. Vivell*, 29 Ill. App. 388 (1888); *Eckstein v. Frank*, 1 Daly (N. Y.) 335 (1863). In some States, infants are prohibited by statute from disaffirming contracts induced by their false representations that they are of age. See Iowa Code (1897), § 3190; Kansas Gen. St. (1901), § 4184; Utah R. S. (1898), § 1543; Wash. Ballinger's Codes and Statutes, § 4582.
20. *Furnes v. Smith*, Rolle Abr. 530 (1635); *Burnard v. Haggis*, 14 C. B. N. S. 45 (1863); *Vasse v. Smith*, 6 Cranch (U. S.) 226 (1810); *Homer v. Thwing*, 3 Pick. (Mass.) 492 (1826); *Campbell v. Stakes*, 2 Wend. 137, 19 Am. Dec. 561 (1828); *Churchill v. White*, 58 Neb. 22, 78 N. W. 369 (1899); *Peigne v. Sutcliff*, 4 McCord L. (S. C.) 387, 17 Am. Dec. 340 (1827); *Freeman v. Boland*, 14 R. I. 39, 51 Am. R. 340 (1882); *Towne v. Wiley*, 23 Vt. 355, 56 Am. Dec. 85 (1851). Contra, *Penrose v. Curren*, 3 Rawle (Pa.) 351 (1832); *Wilt v. Welsh*, 6 Watts (Pa.) 9 (1837). In *Schink v. Strong*, 4 N. J. L. 87 (1818), plaintiff counted on the contract and defendant's willful breach, and was defeated. A similar blunder in the nature of his action defeated plaintiff in *Studwell v. Shapter*, 54 N. Y. 249 (1873), a case of fraudulent representation by defendant inducing credit.
21. *Bristow v. Eastman*, 1 Esp. 172, Peake 223 (1794); *Re Seager*; *Seeley v. Briggs*, 60 L. T. N. S. 665 (1889); *Mills v. Graham*, 1 N. R. 140 (1804); *Lewis v. Littlefield*, 15 Me. 233 (1839); *Catts v. Phalen*, 2 How. (U. S.) 376 (1844); *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429 (1857).
22. *Root v. Stevenson*, 24 Ind. 115 (1865); *Munger v. Hess*, 28 Barb. (N. Y.) 75 (1858).
23. *Caswell v. Parker*, 96 Me. 39, 51 At. 238 (1901); *Stack v. Cavanaugh*, 67 N. H. 149, 30 At. 350 (1891); *Saum v. Coffet*, 79 Va. 510 (1884).
24. *Neal v. Gillet*, 23 Conn. 437 (1855); *Baker v. Morris*, 33 Ks. 580, 7 Pac. 267 (1885); *Conway v. Reed*, 66 Mo. 346, 27 Am. R. 354 (1877).

a child is to be held to such care and prudence only, as is usual among children of his age, experience and capacity.²⁵

When the negligence of the minor amounts to a breach of contract, and subjects him to legal liability only because of the contract relation, his infancy is a defense, as we have seen, whether the form of action be in contract or in tort. In a recent Tennessee case,²⁶ this doctrine was held to exempt an infant from liability in the following circumstances: He had contracted to thresh a quantity of grain for the plaintiff, and while engaged in performing the contract he negligently set fire to certain of plaintiff's property, whereby it was destroyed. When sued for the damage, he pleaded his infancy. The trial court struck out the plea, and plaintiff had a verdict. On appeal, the Supreme Court reversed the judgment, holding that "the gravamen of the action is that the defendant's negligence constituted a breach of the contract." It is submitted that the view of the trial court is not only preferable to that of the Supreme Court, but is in entire accord with the test laid down by the latter tribunal for such cases, viz.: "Whether a liability can be made out without taking notice of the contract." It was immaterial whether the defendant was running an engine pursuant to a contract with plaintiff or not. Being upon plaintiff's land with this dangerous instrument, he was under a common-law duty to use due care to prevent the escape of sparks and resulting injury to plaintiff's property. The plaintiff does not sue for injury to his grain from improper threshing, but for injury to property wholly disconnected with the contract. It was not necessary for him to show any contract between himself and the defendant, and if proved by the defendant, upon cross-examination of plaintiffs witnesses or otherwise, it had nothing to do with plaintiff's cause of action, save as a bit of history.²⁷

150. Parent's Liability for the Child's Tort. Allusion has already been made to the fact, that a parent is liable for a tort which he directs his child to commit.²⁸ He is also liable for torts

²⁵ Haynes v. Gas Co., 114 N. C. 64 S. W. 1068, 57 L. R. A. 673, with 203, 19 S. E. 344, 26 L. R. A. 810, 41 valuable note, 91 Am. St. R. 744 Am. St. R. 786 (1894); Lexington (1901).

Ry. v. Fain (Ky.), 71 S. W. 628 (1903).

²⁷ Hall v. Corcoran, 107 Mass. 251, 257 (1871).

²⁸ Lowery v. Cate, 108 Tenn. 54,

²⁸ Supra, ¶ 145.

committed by his children as his agents or servants;²⁹ and, it has been held, that he must answer for damage resulting from the discharge of firearms by his young children and other misconduct on their part, on his premises and with his permission.³⁰ He is answerable, also, for a child's tort, when the circumstances warrant the inference that he was a party to it, either by precedent approval or by continuing to enjoy its fruits with knowledge of the material facts.³¹

Beyond this, his liability does not extend. The mere relationship of parent does not subject him to legal responsibility for his child's torts.³² If a parent puts a dangerous instrument into the hands of his young child, and "encourages, countenances and consents to its negligent use" by him, he may well be held liable for the injurious consequences.³³ But he would have been equally liable had the youngster been the child of another person.³⁴ In other words, his liability in such cases turns not upon his relationship to the minor, but upon his own exercise of due care.³⁵

151. Parent's Right to Sue for Injury to His Child. The rule in this country upon this subject has been judicially declared as follows: "A parent, whose infant child has been injured by the tort of a third person, has a right of recovery to the extent of his own loss. He cannot recover for the immediate injury to the child. His action rests upon his right to the child's services, and

²⁹. *Teagarden v. McLaughlin*, 86 *Ks.* 423, 25 *Pac.* 851, 11 *L. R. A.* 429, *Ind.* 476, 44 *Am. R.* 332 (1882); 23 *Am. St. R.* 737 (1891); *Paul v. Lashbrook v. Patten*, 1 *Duv. (Ky.)* Hummell, 43 *Mo.* 119, 97 *Am. Dec.* 317 (1864); *Strohl v. Levan*, 39 *Pa.* 381 (1868); *McCalla v. Wood*, 1 *Pen.* 177 (1861); *Andrus v. Howard*, 36 (2 *N. J. L.*) 85 (1806); *Tift v. Tift*, *Vt.* 248, 84 *Am. Dec.* 680 (1863); 4 *Den.* 175 (1847); *Kumba v. Gil-Schaefer v. Osterbrink*, 67 *Wis.* 495, ham, 103 *Wis.* 312, 79 *N. W.* 325 58 *Am. R.* 875 (1886). (1899).

³⁰. *Hoverson v. Noker*, 60 *Wis.* 511, 50 *Am. R.* 381 (1884).

³¹. *Dunks v. Grey*, 3 *Fed.* 862 (1880); *Beedy v. Reding*, 16 *Me.* 362 (1839); *Hower v. Ulrich*, 156 *Pa.* 410, 27 *At.* 37 (1893).

³². *Moon v. Tower*, 8 *C. B. N. S.* 611, 98 *E. C. L.* 611 (1860); *Hagerty v. Powers*, 66 *Cal.* 368, 56 *Am. R.* 101 (1885); *Smith v. Davenport*, 45

³³. *Johnson v. Glidden*, 11 *S. Dak.* 237, 76 *N. W.* 232, 74 *Am. St. R.* 795 with note (1898).

³⁴. *Dixon v. Bell*, 5 *M. & S.* 198, 17 *R. R.* 308 (1816).

³⁵. *Chaddock v. Plummer*, 88 *Mich.* 225, 50 *N. W.* 135, 26 *Am. St. R.* 283, 14 *L. R. A.* 675 (1891); *Har-ris v. Cameron*, 81 *Wis.* 239, 51 *N. W.* 437, 29 *Am. St. R.* 891 (1892).

upon his duty of maintenance. When he is deprived of the right or put to extra expense in fulfilling the duty, in reason and justice he ought to be permitted to have recourse to the wrongdoer for indemnity."³⁶ In England, this right of recovery does not exist, unless the child is old enough to render some act of service.³⁷ The loss of service is the very gist of the action there.

It follows from the American rule, that a recovery by the parent, as guardian or next friend of the child, for damages to the latter, will not bar the parent's action on his own behalf.³⁸ It follows also from the rule, that the tort to the child, in order to be actionable by the parent, must be harmful to him in one of two ways: it must diminish the child's ability to render service, or it must cause extra expense to the parent.³⁹ In case the tort consists in the seduction and debauchment of a female child, the parent may recover more than compensatory damages. In fact, the action is now treated, both in England and in this country, as "one to redress a moral outrage and punish libertinism under the form of a remedy for the loss of manual services."⁴⁰ The jury, in assessing damages, "may consider not only that the plaintiff has a daughter disgraced in the eyes of the neighbors, but that there is a living memorial of the disgrace" (where such is the fact) "in a bastard grandchild."⁴¹

While the father is the only parent⁴² ordinarily entitled to maintain an action for a tort to a child, if he is dead,⁴³ or, if he

³⁶ *Nederland, etc., Co. v. Hollander*, 20 U. S. App. 225, 59 Fed. 417 (1894).

³⁷ *Hall v. Hollander*, 4 B. & C. 600, 10 E. C. L. 436, 7 D. & R. 133, 28 R. R. 437 (1825); Sir Frederick Pollock notes that "this case does not show that, if a jury chose to find that a very young child was capable of service, their verdict would be disturbed." Pollock, *Torts* (6 Ed.) 228, n. (b).

³⁸ *Wilton v. Middlesex Ry. Co.*, 125 Mass. 130 (1878); *McGarr v. Nat. & Prov. Mills*, 24 R. I. 447, 53 At. 320, 60 L. R. A. 122 (1902).

³⁹ *Donahoe v. Richards*, 38 Me.

376 (1854); *Dennis v. Clark*, 2 Cush. (Mass.) 347, 48 Am. Dec. 671 (1848); *Cuming v. Brooklyn Ry.*, 109 N. Y. 95, 16 N. E. 65 (1888).

⁴⁰ *Lipe v. Eisenlerd*, 32 N. Y. 229 (1865). Verdict for \$1,000, sustained.

⁴¹ *Terry v. Hutchinson*, L. R. 3 Q. B. 559, 603 (1868). Verdict for £150 sustained.

⁴² *Geraghty v. New*, 27 N. Y. Supp. 403, 7 Misc. 30 (1899); *Worcester v. Marchant*, 14 Pick. (Mass.) 510 (1833).

⁴³ *Horgan v. Pacific Mills*, 158 Mass. 402, 33 N. E. 581, 35 Am. St. R. 504 (1893); *Gray v. Durland*, 50

relinquishes his duty to support and provide for his children,⁴⁴ the widow or the wife, as the case may be, may bring the action, in most of our jurisdictions. So, a person standing *in loco parentis* may recover for expenses and loss of service resulting to him from tort to a minor.⁴⁵

152. Tort Actions by Child against Parent. The law imposes upon the parent the duty of caring for, guiding, and controlling his children, and clothes him with the power of enforcing discipline in a reasonable manner. If he exercises this authority with cruelty, he may subject himself to criminal punishment,⁴⁶ and forfeit his right to the custody and services of the maltreated child.⁴⁷ There is some authority for the proposition that the cruel parent may be sued in a tort action by the injured child;⁴⁸ but the better view seems to be that "the peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families, and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent."⁴⁹

The parental power of discipline may be delegated, either expressly to a specified person,⁵⁰ or impliedly, as to schoolmasters.⁵¹

Barb. 100, 211 (1867); *affd.* 51 N. Y. 424 (1873); *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. R. 441 (1874); *Villepligue v. Shular*, 3 Strobb. L. (S. C.) 462 (1849).

44. *McGarr v. Nat. & Prov. Mills*, 24 R. I. 447, 53 At. 329, 60 L. R. A. 122 (1902).

45. *Manvel v. Thompson*, 2 Car. & P. 303 (1826); *Whitaker v. Warren*, 60 N. H. 20, 49 Am. R. 302 (1880).

46. *Hinkle v. State*, 127 Ind. 490, 26 N. E. 777 (1890); *State v. Jones*, 95 N. C. 588 (1886).

47. *Cunningham's Case*, 61 N. J. Eq. 454, 48 At. 391 (1901); *Farnham v. Pierce*, 141 Mass. 203, 6 N. E. 830 (1886).

48. *Reeve's Domestic Relations* (4 Ed.) 357; *Treschman v. Tresch-*

man, 28 Ind. App. 206, 61 N. E. 961 (1901); *Clasen v. Pruhs*, 69 Neb. 278, 95 N. W. 640 (1903).

49. *Foley v. Foley*, 61 Ill. App. 577 (1895); *Hewlette v. George*, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682 (1891); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S. W. 664, 64 L. R. A. 991 (1903); *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788, 68 L. R. A. 893 (1905), tort action by daughter against father for rape denied, though he had been convicted of the crime.

50. *Harris v. State*, 115 Ga. 578, 41 S. E. 983 (1902).

51. *Heritage v. Dodge*, 64 N. H. 297 (1886); *Cleary v. Booth* (1893), 1 Q. B. 465.

Such persons, however, are liable in tort to the child, if they exercise their delegated power in an unreasonable manner, or with malice.⁵³

§ 3. ACTIONS INVOLVING THE RELATION OF MASTER AND SERVANT.

153. Terms Used in Their Generic Sense. The terms master and servant, in this connection, will be used in their early and generic sense,⁵³ and not with the specific signification which differentiates them from principal and agent. While the agent as distinguished from the servant, is employed to represent his principal in creating contract obligations,⁵⁴ many, perhaps most, agents are also employed to do acts for their principal which are not to subject him to contract liability, but may make him answerable in tort.⁵⁵ And it is the liability to a tort action, growing out of the relation of employer and employed, that we are to consider in this section.

A public officer is not, ordinarily, the servant of particular citizens in whose behalf he is acting. Hence, if a sheriff enforces an execution against property which does not belong to the judgment debtor, he does not subject the judgment creditor to liability therefor.^{55a} Yet the latter may take such an active part in directing the actions of the sheriff as to make himself responsible for them;^{55b} as he may by adopting unlawful acts done by an officer on his behalf.^{55c}

⁵² Lander v. Seaver, 32 Vt. 114 (1859).

⁵³ In Bacon's Abridgment, under the title of Master and Servant, it is said: "The relationship between a master and a servant is in many respects applicable to other relationships, such as lord and bailiff, principal and attorney, owners and masters of ships, merchants and factors." Bacon has no topic of "Principal and Agent."

Blackstone divides servants into four classes: Menial Servants; Apprentices; Laborers, and a "fourth species such as Stewards, factors and bailiffs, whom the law con-

siders as servants *pro tempore*, with regard to such of their acts as affect their master's or employer's property." Vol. 1, pp. 425-428.

⁵⁴ Dwight, Persons and Personal Property, p. 323. Huffcut on Agency, chap. 1 (2d Ed.).

⁵⁵ Singer Manufacturing Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175 (1889).

^{55a} Hyde v. Cooper, 26 Vt. 552 (1854).

^{55b} Hill v. White, 46 App. Div. 360, 61 N. Y. Supp. 515 (1899).

^{55c} Stuart v. Andrews, 104 Me. 17, 70 At. 1069 (1908).

154. The Master's Liability for the Servant's Tort. Its Basis. The liability of a master extends beyond those wrongs done by his authority, or on his behalf and ratified by him. Speaking generally, he is answerable also for the wrongs of his servant, whether authorized or ratified by him or not, which are done in the course of the servant's employment and of the master's business.⁵⁶

Doubt has been expressed by a learned author and judge,⁵⁷ whether, if we were contriving a new code to-day, we would impose so extensive a liability on the master. He finds it hard to explain why the master is subjected to this liability, save upon the theory that it is a survival from the far-off time when the servant was a slave,⁵⁸ and, by a fiction of law, he and his master were "feigned to be all one person."⁵⁹

155. Different Historical Stages of Liability. This theory does not seem to accord with the facts of English legal history. They indicate that the master's liability for his servant's torts has passed through distinct stages of development, and that the present rule rests not on grounds of policy which belonged to a different state of society, nor does it result from "a fiction which is an echo of *patria potestas* and the English frank-pledge,"⁶⁰ but was slowly and cautiously evolved, and did not take its present form until the nineteenth century.⁶¹ It was deliberately based upon considerations of practical expediency; and upon such considerations its continuance has been repeatedly rested. Lord Brougham declared that the reason for the master's liability for his servant's torts is, that by employing him, the master "sets the whole thing in motion."⁶²

Chief Justice Shaw defended the rule as "obviously founded on the great principle of social duty that every man in the management of his own affairs, whether by himself or by his agents or

⁵⁶ Pollock on Torts (6th Ed.), pp. 53, 574 (9th Ed.), p. 611; Huffcut on Agency (2d Ed.), 295.

⁵⁷ Holmes, J., in *Dempsey v. Chambers*, 154 Mass. 330, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. R. 249 (1891).

⁵⁸ Holmes Common Law, p. 228.

⁵⁹ Ibid. Lect. 1: 4 Harvard L. Rev. 350.

⁶⁰ *Dempsey v. Chambers*, 154 Mass. 330, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. R. 249 (1891).

⁶¹ Responsibility for Tortious Acts, by Prof. John H. Wigmore, 7 Harv. L. Rev. 315, 383, 441; *Helms v. Nor. Pac. Ry.*, 120 Fed. 389 (1903).

⁶² *Duncan v. Findlater*, 6 Cl. & F. 894, 910 (1839).

servants, shall so conduct them as not to injure another,⁶³ and if he does not, and another thereby sustains damage, he shall answer for it.”⁶⁴ Judge Grier, writing for the Supreme Court of the United States, said: “We find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master.

* * * If such disobedience could be set up by a railroad company as a defense, when charged with negligence, the remedy of the injured party would in most cases be illusive, discipline would be relaxed and the danger to life and limb of the traveler greatly enhanced. Any relaxation of the stringent policy and principles of the law affecting such cases, would be highly detrimental to the public safety.”⁶⁵

156. Who Is a Servant? The rule stated above assumes that the relation of master and servant exists between the defendant and the wrongdoer. Ordinarily, the question whether this relation exists in a particular case is not a difficult one, for it results from the voluntary agreement of the parties. We have seen that the husband was liable at common law for his wife's torts, but that his liability in such a case was not that of a master for his servant's wrongdoing.⁶⁶ To subject him to responsibility in that character, it was necessary to show that she was in fact a servant or agent of her husband in the particular transaction.⁶⁷ We have also seen that similar proof was necessary to render the parent liable for his child's torts.⁶⁸

157. Compulsory Pilot, Engineer, etc. Again, a person is not liable at common law for the wrongdoing of one whose services are forced upon him by the State. If a pilot is employed by the master or owner of a ship, we have the ordinary case of master and ser-

⁶³. Of course, if the harm done by the servant is the result of inevitable accident, as when the servant

stumbles, without negligence, and knocks plaintiff down, the master is not liable. *Wall v. Lit*, 195 Pa. 375, 46 At. 4 (1900).

⁶⁴. *Farwell v. Boston, etc., Ry.*, 4

Met. (Mass.) 49 (1842).

⁶⁵. *Philadelphia, etc., Ry. v. Derby*, 14 How. (U. S.) 468, 487 (1852).

⁶⁶. *Supra*, ¶ 140.

⁶⁷. *Taylor v. Green*, 8 C. & P. 316 (1837).

⁶⁸. *Supra*, ¶ 150.

vant;⁶⁹ but if the law compels the employment of a particular pilot, or takes from the shipowner or master the right of choosing his pilot, the relation of master and servant does not exist, and for the fault of such a pilot the shipmaster or owner is not responsible.⁷⁰ Such is also the English rule in Admiralty, but in this country, the Admiralty doctrine is⁷¹ that the vessel "is in some sense herself a principal, and anyone having lawful command of her is, for the time being, her agent, for whose conduct she is herself responsible, both in contract and in tort." Hence in a proceeding *in rem* the vessel may be held liable for the consequences of a collision through the negligence of a pilot compulsorily taken on board.

158. Independent Contractors. The liability of a master for the torts of his servant rests, as we have seen, upon considerations of practical expediency. A man is bound to manage his affairs with a due regard for the safety of the persons and property of his fellows. But suppose he turns over the management of certain of his transactions to persons, who undertake to accomplish a prescribed result, but who are not otherwise subject to his control. Must he answer for their torts which are incident to the transaction? He does, indeed, "set the whole thing in motion;" but such persons are not his servants in the ordinary sense of that term. He does not direct and control their acts, and has no right to command obedience from them. They are the principals in the work which they have in hand. For damages inflicted by their misconduct, or the misconduct of those under their control, they are liable, and the law does not permit the injured person to go back

⁶⁹. "And it will make no difference in the case that the pilot, if any is employed, is required to be a licensed pilot; provided the master is at liberty to take a pilot or not at his pleasure." Story on Agency (2d Ed.), § 456a. Cf. Consolidated Coal Co. v. Seniger, 179 Ill. 370, 53 N. E. 733 (1899), and Durkin v. Kingston Coal Co., 171 Pa. 193, 33 At. 237 (1895); Wilmington Mining Co. v. Fulton, 205 U. S. 60, 27 Sup. Ct. 412 (1907). In these cases, the same doctrine was applied to mine managers and inspectors, which were required to have State certificates of fitness for their duties.

⁷⁰. Homer Ramsdell Tr. Co. v. La Compagnie Trans., 182 U. S. 406, 21 Sup. Ct. 831 (1901); The Halley, L. R. 2 P. C. 193, 37 L. J. Adm. 33 (1868).

⁷¹. The China, 7 Wall. (U. S.) 53, 19 L. Ed. 67 (1868); Ralli v. Troop, 157 U. S. 386, 15 Sup. Ct. 657, 39 L. Ed. 742 (1894).

of them in the line of causation,⁷² save in exceptional cases, to be noted hereafter.

159. Who are Independent Contractors? The test generally applied in answering this question is "independence of control in employing workmen and in selecting the means of doing the work."⁷³ If the employer retains the right to determine and direct the manner in which the work is to be done, to point out the dangers to be avoided and to fix the extent to which the work shall be carried on, it does not matter that the work is let out by the job to one who supplies laborers and materials. The principal is the employer, and not the contractor, and the latter and his laborers are the servants of the former.⁷⁴ It is not necessary in such a case that the employer should actually guide and control the contractor. It is enough that the contract vests him with the right of guidance and control.⁷⁵

On the other hand, an independent contractor is not converted into a servant by provision in the contract which reserves to the employer certain rights of supervision and approval, during the progress of the work.⁷⁶ If these stipulations are for the purpose of securing faithful compliance with the specifications on the part of the contractor, the relation remains that of employer and independent contractor, though the stipulations give the employer the right to reject work or material which does not conform to the

⁷² In *Murray v. Currie*, L. R. 6 L. R. A. 550 (1901); *Wright v. Big C. P.* 24, 40 L. J. C. P. 26 (1870), *Rapids Co.*, 124 Mich. 91, 82 N. W. Willes, J., said: "In ascertaining 829, 50 L. R. A. 495 (1900).

who is liable for the act of a wrongdoer, you must look to the wrongdoer himself, or to the first person in the ascending line, who is the employer and has control over the work. You cannot go further back and make the employer of that person liable." In *Painter v. Mayor*, 46 Pa. 213 (1863), and *Heidenaag v. City of Philadelphia*, 168 Pa. 72, 31 At. 1063 (1895), it is said: "There cannot be more than one superior legally responsible."

⁷⁴ *Atlantic Transport Co. v. Coneys*, 82 Fed. 177, 51 U. S. App. 570 (1897); *Railroad Co. v. Hanning*, 15 Wall. (U. S.) 649 (1872).
⁷⁵ *Linnehan v. Rollins*, 137 Mass. 123 (1884); *Barg v. Bonsfield*, 65 Minn. 355, 68 N. W. 45 (1896); *Congregation v. Smith*, 163 Pa. 561, 30 At. 279 (1894).

⁷⁶ *Steel v. Southeastern Ry.*, 16 C. B. 550 (1855); *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. 672 (1893); *Thomas v. Altoona, etc., Ry.*, 191 Pa. 361, 43 At. 215 (1899).

⁷³ *Uppington v. City of New York*, 165 N. Y. 222, 59 N. E. 91, 53

specifications, or to stop the work,⁷⁷ or even to insist upon the dismissal of incompetent workmen.⁷⁸

160. Determined by the Contract. It is apparent from what has been said, that whether the relation in a particular case is that of employer and independent contractor, or of master and servant, depends upon the terms of the contract, in the absence of legislation.⁷⁹ If this is in writing, or though it be oral, if but one inference can be drawn from the evidence, the question is presented for the court;⁸⁰ while if more than one inference can fairly be drawn, the question should go to the jury.⁸¹ A physician whose services are supplied by a common carrier to an employee,⁸² or to a passenger,⁸³ or by another physician to the latter's patient,⁸⁴ or who is

77. *Stephen v. Commissioners*, 3 172 (1899); *Vosbeck v. Kellogg*, 78 Sess. Cases (4th Series) 535, 542 Minn. 176, 80 N. W. 957 (1899); *Allen v. Willard*, 57 Pa. 374 (1868); *Vosbeck v. Kellogg*, 78 Minn. 176, 80 N. W. 957 (1899); *Sanford v. Pawtucket, etc., Ry.*, 19 Blumb v. City of Kansas, 84 Mo. 112 R. I. 537, 35 At. 67, 33 L. R. A. 564 (1884). (1896); *Singer Manufacturing Co. v. Rahn*, 132 U. S. 518, 10 Sup. Ct. 175 (1889).

78. *Uppington v. City of New York*, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550 (1901); *Reedie v. London, etc., Ry.*, 4 Exch. (W. H. & G.) 244 (1849).

79. *Cargill v. Duffy*, 123 Fed. 721 (1903). The driver of a licensed cab in New York city is the servant of the owner, towards the public, although a bailee of the horse and vehicle. In *McColligan v. Penn. Ry.*, 214 Pa. 229, 63 At. 792, 6 L. R. A. N. S. 544, 6 Col. Law Rev. 593 (1906), the cabman was held a bailee of the railroad and not its servant even towards the public, distinguishing the English cases, which *Cargill v. Duffy* followed.

80. *Sadler v. Henlock*, 4 E. & B. 570 (1855); *Adams Express Co. v. Schofield*, 111 Ky. 832, 64 S. W. 903 (1901); *Leavitt v. Bangor, etc., Ry.*, 89 Me. 509, 36 At. 998, 36 L. R. A. 382 (1897); *Boomer v. Wilbur*, 176 Mass. 482, 57 N. E. 1004, 53 L. R. A. 193, 33 At. 389 (1895).

81. *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922 (1902). In *Dutton v. Amesbury Nat. Bank*, 181 Mass. 154, 62 N. E. 405 (1902), the majority thought but one inference was warrantable, while one judge thought two could be drawn; *Klages v. Gillette-Herzog Co.*, 86 Minn. 458, 90 N. W. 1116 (1902); *Howard v. Ludwig*, 171 N. Y. 507, 64 N. E. 172 (1902); *Wallace v. Southern Cotton Oil Co.*, 91 Tex. 18, 40 S. W. 399 (1897); *Emerson v. Fay*, 94 Va. 60, 26 S. E. 386 (1896).

82. *York v. Chicago, etc., Ry.*, 98 Ia. 544, 67 N. W. 574 (1896).

83. *Obrien v. Cunard S. S. Co.*, 154 Mass. 272, 28 N. E. 266 (1891); *Allen v. State Steamship Co.*, 132 N. Y. 91, 30 N. E. 482, 15 L. R. A. 166, 28 Am. St. R. 556 (1892).

84. *Myers v. Holborn*, 58 N. J. L. 193, 33 At. 389 (1895).

sent by one who has injured the plaintiff to examine the latter,⁸⁵ is an independent contractor. "There is no more distinct calling than that of the doctor," said Holmes, C. J., in the last cited case, "and none in which the employee is more distinctly free from the control of his employer." The only duty, resting upon the one who supplies the physician, is to use proper care in selecting him.

A mason, a carpenter, or other mechanic, whose business is recognized as a distinct trade,⁸⁶ or a truckman⁸⁷ or livery stable proprietor,⁸⁸ renders service to his employer, ordinarily, as an independent contractor and not as a servant. However, the employer may estop himself from showing that such a mechanic is an independent contractor, when he holds himself out as the master.⁸⁹

85. *Pearl v. West End Ry.*, 176 Mass. 177, 57 N. E. 339, 49 L. R. A. 826, 79 Am. St. R. 309 (1900).

86. *Lawrence v. Shipman*, 39 Conn. 586 (1873).

87. *Murray v. Dwight*, 161 N. Y. 301, 55 N. E. 901, 48 L. R. A. 673 (1900). The prevailing opinion says: "The relation of master and servant is often confused with some other relation. The mere fact that some person renders some service to another for compensation, expressed or implied, does not necessarily create the legal relation of master and servant. There are many kinds of employment which are peculiar and special, where one person may render service to another without becoming his servant in the legal sense. A servant is one who is employed to render personal services to his employer, otherwise than in the pursuit of an independent calling. The truckman who transports the traveler's baggage or the merchant's goods to the railroad station, though hired and paid for the service by the owner of the baggage or the goods, is not the servant of the person who thus em-

plays him. He is exercising an independent and quasi public employment in the nature of a common carrier, and his customers, whether few or many, are not generally responsible for his negligent or wrongful acts, as they may be for those of other persons in their regular employment as servants. A contract, whether express or implied, under which such special jobs are done or such special services rendered, is not that of master and servant, within the law of negligence."

88. *Quarman v. Burnett*, 6 M. & W. 499 (1840); *Jones v. Corporation*, 14 Q. B. D. 890 (1885); *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516 (1883); *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922 (1902); *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 23 L. Ed. 655 (1885); *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. N. S. 481 (1911).

89. *Hannon v. Siegel-Cooper Co.*, 167 N. Y. 244, 60 N. E. 597, 52 L. R. A. 429 (1901).—Defendant held himself out as practicing dentistry, in one of the departments of its store,

161. A Servant with Two Masters. It often happens that a man is hired and paid by A, and thus becomes his servant, but, for certain transactions is transferred by A to the service of B. While thus engaged about B's affairs, he tortiously injures a third person. Is A or B to respond as master for the damage? Upon principle, the answer would seem not to be difficult, and that A or B should be liable, according as the one or the other had the right to control the act or omission which caused the harm. And such seems to be the answer given by the best considered cases. Accordingly, if A lends⁹⁰ or leases⁹¹ his servant to B, or places him upon B's premises,⁹² pursuant to an arrangement by which B is to have the right to direct the acts or control the conduct of the servant, B must respond for the torts of the servant, while thus engaged. On the other hand, if, in the transaction, A sustains the relation of independent contractor to B, so that the latter's right of control is limited to indicating the work to be done, and does not extend to directing how it shall be done, then A and not B is answerable for the servant's torts.⁹³

It often happens that there is a sort of duality of service.⁹⁴ With respect to certain acts, A retains the right of control, while with respect to others, the right of control is vested in B. In such

and was declared liable for the malpractice of the dentists, although they were in fact practicing on their own account. *Chicago, etc., Ry.*, 114 Fed. 100, 52 C. C. A. 48 (1902).

90. *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205, 46 L. J. C. P. 283 (1877); *Grace & Hyde Co. v. Probst*, 208 Ill. 147, 70 N. E. 12 (1904).

91. *Donovan v. Lang*, (1893), 1 Q. B. 629, 63 L. J. Q. B. 25; *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114 (1904); *Roe v. Winston*, 86 Minn. 77, 90 N. W. 122 (1902); *McInerney v. Del. & Hud. Ry.*, 151 N. Y. 411, 45 N. E. 848 (1897); *Higgins v. West Un. Tel. Co.*, 156 N. Y. 75, 50 N. E. 500, 66 Am. St. R. 537 (1898).

92. *Atwood v. Chicago, etc., Ry.*, 72 Fed. 447 (1896); *Brady v. Chi-*

93. *Jones v. Mayor, etc., of Liverpool*, 14 Q. B. D. 890, 54 L. J. Q. B. 345 (1885); *Cameron v. Nystrom*, (1893), A. C. 308, 62 L. J. P. C. 85; *Stewart v. Calif. Imp. Co.*, 131 Cal. 125, 63 Pac. 177 (1900); *Wood v. Cobb*, 13 Allen (95 Mass.) 58 (1866); *Murray v. Dwight*, 161 N. Y. 301, 55 N. E. 901, 48 L. R. A. 673 (1900). The dissenting opinion in this case is based upon the view that the servant of the contractor was subject to the control of the defendant. *Quinn v. Complete Electric Company*, 46 Fed. 506 (1891).

94. *D. L. & W. Ry. v. Hardy*, 59 N. J. L. 35, 37, 34 At. 986 (1896).—

"Doubtless, no man can serve two masters, yet the law recognizes a

cases A or B will be liable according as the negligent act belongs to the one or the other class. For example, if A lets his horses, wagon and driver to a city which is engaged in paving a street, and through the negligence of the driver, in looking after the shoeing of the horses and driving them, a horse kicks a loose shoe through the plaintiff's plate glass window, A and not the city is liable.⁹⁵ Had the plaintiff been injured, however, by the negligent manner in which the servant carried out an order which the city had a right to give him, the city would have been liable.⁹⁶ So, the borrower or hirer is liable, if, knowing the unfitness of the borrowed article or servant, he continues them in carrying on his business.^{96a}

162. Temporary Transfer of Service: An admirable statement of the principles applicable to these cases of temporary transfer of service, is found in a recent Massachusetts decision:⁹⁷ "In such

sort of duality of service. A general servant of one person may, for a particular work, or for a particular occasion become, *pro hac vice*, the servant of another person." In *Atwood v. Chicago, etc., Ry.*, 72 Fed. 447, 454 (1896), Phillips, J., said: "It is a doctrine as old as the Bible itself, and the common law of the land follows it, that a man cannot serve two masters at the same time; he will obey the one, and betray the other. He cannot be subject to two controlling forces which may at the time be divergent. So the English courts, which are generally apt to hit the blot in the application of fundamental rules, hold that there can be no application of the doctrine of *respondeat superior* in its application to two distinct masters; that the servant must be subject to the jurisdiction of one master at one time." Of course the same person may be acting in a particular transaction as the servant of two masters, as when the affairs of two corporations are carried on at the

same place and by the same employees. If it is found as a matter of fact that the tort was committed by one while rendering service to both corporations, both will be liable. *Dieters v. St. Paul Gas Light Co.*, 86 Minn. 474, 91 N. W. 15 (1902).

⁹⁵. *Huff v. Ford*, 126 Mass. 24, 30 Am. R. 645 (1878); *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114 (1904); *Consolidated Fireworks Co. v. Koehl*, 190 Ill. 145, 60 N. E. 87 (1901).

⁹⁶. *Donovan v. Lang* (1893), 1 Q. B. 629; *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922 (1902); *Roe v. Winston*, 86 Minn. 77, 86, 90 N. W. 122 (1902).

^{96a}. *Corliss v. Keown*, 207 Mass. 149, 93 N. E. 143 (1910).

⁹⁷. *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922 (1902). See *The Elton*, 142 Fed. 367, 73 C. C. A. 467 (1906); *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252 (1909).

cases the party who employs the contractor indicates the work to be done, and in that sense controls the servant, as he would control the contractor if he were present. But the person who receives such orders is not subject to the general orders of the party who gives them. He does his own business in his own way, and the orders which he receives simply point out to him the work which he or his master has undertaken to do. There is not that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to make the employer liable under the fiction that the act of the employed is his act.

"Of course the chances are that some orders will be given which are not strictly within the contract of the master. That is to be expected from the relative positions of the servant and the other party. If the latter has something that he wants done and sees a working man at hand, he is likely to ask him to do it, and if it is within the penumbra of his business the servant is likely to obey. While he thus goes outside his master's undertaking and his own contract with his master, he ceases to represent him,⁹⁸ and he may make the other liable for his acts,⁹⁹ but he does not on that account become the servant of his master's contractee for all purposes, or when he returns to the work which his master agreed to perform."

If the evidence does not show clearly that A's servant has been put, for the time being, under B's control, a question of fact for the jury as to whether A or B is the master seems to be presented,¹⁰⁰ although the burden seems to be on B of showing that one who is rendering service to him is not his servant, but the servant of A.¹

163. Right of Selecting and Discharging Servant: In some cases the test of liability for the servant's torts, in such cases as

⁹⁸ *Brown v. Engineering Co.*, 166 Mass. 75, 43 N. E. 1118, 32 L. R. A. 605, 55 Am. St. Rep. 382 (1896); *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285 (1893).

⁹⁹ *Kimball v. Cushman*, 103 Mass. 194, 4 Am. Rep. 528 (1869).

¹⁰⁰ *Howard v. Ludwig*, 171 N. Y. 507, 64 N. E. 172 (1902). The

minority of the court thought the evidence in this case did not warrant the inference that the wrongdoer was the servant of the defend-

ant, but showed clearly that he remained the servant of his general master, the University Express Co.; distinguished in *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 199, 96 N. E. 406, 38 L. R. A. N. S. 481 (1911); *Ward v. New England Fibre Co.*, 154 Mass. 419, 28 N. E. 299 (1891).

¹ *Taylor, etc., Ry. Co. v. Warner*, 88 Tex. 642, 648, 32 S. W. 868 (1895).

we have been considering, has been declared to be, Who has the right of selecting and discharging him? If this test is applied, the liability will be thrown in almost every case upon the general master.³ But it is submitted that the true test is that set forth in a preceding paragraph, and tersely stated by an eminent English judge: "The true principle of law is that if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing, not my work, but the work of the independent contractor."⁴

164. Exceptional Liability of Employer for Torts of Independent Contractor: In some cases, as already noted, a person harmed by the tort of an independent contractor is allowed to go beyond this principal, and seek redress from the contractor's employer. The extent of this exceptional liability is a question upon which the courts of this country are not agreed. Its narrowest limits are those fixed by the New York decisions. "Where the employer personally interferes with the work and the acts performed by him occasion the injury; where the thing contracted to be done is unlawful;⁴ where the acts performed create a public nuisance;⁵ and where an employer is bound by a statute to do a

2. New Orleans, etc., Ry. v. Norwood, 62 Miss. 565 (1885); Michael v. Stanton, 3 Hun (N. Y.) 462 (1875); Burton v. Galveston, etc., Ry., 61 Tex. 526 (1884); The Slingsley, 120 Fed. 748 (1903). In this case the court said: "Of all the tests which have been suggested, and the authorities are far from uniform, it would seem that this, the power of substitution of one man for another, is the most satisfactory. It may not in all cases be as apparent as it is in this one that B. has no power to remove or differently employ the individual whom A. has selected and assigned to a special line of work, but when it does appear, the amount of control which B. exercises over the individual is surely insufficient to establish, even *pro hac vice*, the relation of master and servant."

3. Brett, J., in Murray v. Currie, L. R. 6 C. P. 24 (1870).

4. Ellis v. Sheffield Gas Co., 2 E. & B. 767, 23 L. J. Q. B. 42 (1853); Spence v. Schultz, 103 Cal. 208, 37 Pac. 220 (1894); McDonnell v. Rifle Boom Co., 71 Mich. 61, 38 N. W. 681 (1888); Crisler v. Ott, 72 Miss. 166, 16 So. 416 (1894); Ketcham v. Newman, 141 N. Y. 205, 209, 36 N. E. 197, 24 L. R. A. 102 (1894).

5. Hole v. Railway Co., 6 H. & N. 488 (1861); Deford v. State, Use of Keyser, 30 Md. 179 (1863); Woodman v. Met. Ry., 149 Mass. 335, 21

thing efficiently, and an injury results from its inefficiency,"⁶ are the only cases "where a person employing a contractor" is liable for his torts.⁷

On the other hand, the broadest statement of this exceptional liability is found in a recent Ohio decision,⁸ as follows: "The weight of reason and authority is to the effect that, where a party is under a duty to the public or third person to see that work he is about to do, or have done, is carefully performed, so as to avoid injury to others, he cannot by letting it to a contractor, avoid his liability, in case it is negligently done to the injury of another."

It will be observed that the New York doctrine recognizes and expresses such a duty—a duty which the employer cannot assign to a contractor—in three classes of cases: (1) where the work contracted for is unlawful. (2) where it amounts to a public nuisance, and (3) where a statute imposes the duty. To this extent, then,

N. E. 482, 4 L. R. A. 213 (1889); *Railway Co.*, 6 Hurl. & N. 488
Thomas v. Harrington, 72 N. H. 45, (1861); *Gray v. Pullen*, 5 Best & S.
 54 At. 285 (1903); *Deming v. Terminal Ry.*, 169 N. Y. 1, 61 N. E. 983 (1901).
 970 (1864); *Hardaker v. Idle Dist.* (1896), 1 Q. B. 335; *Storrs v. City of Utica*, 17 N. Y. 104 (1858);

6. *Smith v. Milwaukee, etc., Exchange*, 91 Wis. 360, 64 N. W. 1041, 51 Am. St. R. 912, 30 L. R. A. 504 (1895).
Spence v. Schultz, 103 Cal. 208, 37 Pac. 220 (1894); *Sturges v. Society*, 130 Mass. 414 (1881); *Gorham v. Gross*, 125 Mass. 232 (1878); *Mecham, Ag.* § 747, 748; *Whart. Neg.* § 185; *Wood, Mast. & Serv.* § 316; *Shear. & R. Neg.* § 176; *Pickard v. Smith*, 10 C. B. (N. S.) 470 (1861); *Penny v. Council* (1898), 2 Q. B. 212, 217; *Halliday v. Telephone Co.*, (1899), 2 Q. B. 392; *Lawrence v. Shipman*, 39 Conn. 586, 589 (1873); *Stevenson v. Wallace*, 27 Grat. (Va.) 77 (1876); *Water Co. v. Ware*, 16 Wall. 566, 21 L. Ed. 485 (1872); *Black v. Finance Co.* (1894), App. Cas. 48; *Pittsfield, etc., Co. v. Shoe Co.*, 71 N. H. 522, 53 At. 807, 60 L. R. A. 116 (1902); *Davis v. Summerfield*, 133 N. C. 325, 45 S. E. 654, 63 L. R. A. 492 (1903).

7. *Berg v. Parsons*, 156 N. Y. 109, 50 N. E. 957, 41 L. R. A. 391, 66 Am. St. R. 542 (1898). The New Jersey courts seem to hold this view. See *Cuff v. Newark, etc., Ry.*, 35 N. J. L. 1, 10 Am. R. 205 (1870); *Schutte v. United Electric Co.*, 68 N. J. L. 435, 53 At. 204 (1902). See *Hoff v. Shockley*, 122 Ia. 720, 98 N. W. 573, 64 L. R. A. 538 (1904).

8. *Covington, etc., Co. v. Steinbock*, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. R. 375 (1899), with note citing: "*Bower v. Peate*, 1 Q. B. D. 321; *Tarry v. Ashton*, Id. 314 (1876); *Hughes v. Percival*, 8 App. Cas. 443 (1883); *Dalton v. Angus*, 6 App. Cas. 829 (1881); *Hole v.*

all authorities are agreed. Undoubtedly, the weight of authority favors the recognition and enforcement of such a duty, also, when "according to previous knowledge and experience the work to be done is in its nature dangerous to others, however carefully performed."⁹ The negligence of the contractor or his servants, in such a case, is often spoken of as not collateral to the work, but directly involved in it.¹⁰

165. Collateral and Direct Negligence: Two recent cases well illustrate the distinction between "collateral" and "direct" negligence above referred to. In one case,¹¹ the owner of property employed an independent contractor to repair certain chimneys, by taking off a few feet and relaying the brick. Such work, the court declared, was not such as would necessarily endanger persons in the street. It did not involve throwing brick into the street, or causing or allowing them to fall so as to endanger persons traveling therein. The negligence of the contractor's servants in handling bricks was a mere detail of the work. The work itself could not be classed as dangerous. Any negligence of the contractor's servants was merely "collateral" to the work, and did not render the owner of the chimneys liable.

In the other case, the owner of property, who had been ordered by the inspector of buildings to remove the walls of a ruined build-

9. Cf. *Ridgeway v. Downing Co.*, 109 Ga. 591, 34 S. E. 1028 (1900), applying the following § 3819 of the Civil Code: "The employer is liable for the negligence of the contractor; (1) when the work is wrongful in itself, or, if done in the ordinary manner, would result in a nuisance; (2) or, if according to previous knowledge and experience, the work to be done is in its nature dangerous to others, however carefully performed; (3) or, if the wrongful act is in violation of a duty imposed by express contract upon the employer; (4) or, if the wrongful act is violation of a duty imposed by statute; (5) or, if the employer retains the right to direct or control the time and manner of executing the work; or interferes and assumes control, so as to create the relation of master and servant, or so that an injury results which is traceable to his interference; (6) or, if the employer ratifies the unauthorized wrong of the independent contractor."

10. *Hole v. Ry. Co.*, 6 H. & N. 488 (1861); *Bower v. Peate*, 1 Q. B. D. 321, 45 L. J. Q. B. 446 (1876); *Pye v. Faxon*, 156 Mass. 471, 31 N. E. 640 (1892); *Water Co. v. Ware*, 16 Wall. (U. S.) 566 (1872).

11. *Boomer v. Wilbur*, 176 Mass. 482, 57 N. E. 1004, 53 L. R. A. 172 (1900).

ing, as a nuisance to the public as well as to adjoining property, let the job of removal to an independent contractor, who had agreed to save the owner harmless for injuries done to others in the performance of the contract. Plaintiff was injured, through the negligence of the contractor and his servants. The court held the owner liable for the injury, on the ground that "the doing of the work necessarily involved danger to others, unless great care was used, and the injury resulted from negligence in doing the work. It was not collateral to the employment, as would have been the case had a servant of the contractor, while at work, negligently let fall a brick upon a person passing by."¹² In reply to the argument that it is "unreasonable that one who has work to perform, that he himself cannot perform from want of knowledge or skill, should be held liable for the negligence of one whom he employed to do it, since, if he did reserve control, it would avail nothing, from his own want of knowledge and skill," the court said: "There is seeming force in this, but only so. It is not agreeable to the principles of distributive justice; for it is equally a hardship that one should suffer loss by the negligent performance of work which another procured to be done for his own benefit, and which he in no way promoted and over which he had no control. Hence, where work is to be done that may endanger others, there is no real hardship in holding the party, for whom it is done, responsible for neglect in doing it. Though he may not be able to do it himself, or intelligently supervise it, he will nevertheless be the more careful in selecting an agent to act for him. This is a duty which arises in all cases where an agent is employed, and no harm can come from stimulating its exercise, in the employment of an independent contractor, where the rights of others are concerned."¹³

166. **What Work is Intrinsically Dangerous?** This is a question which has proved troublesome even for the courts which recognize and enforce the distinction taken in the cases last cited. A contract to burn brush on the defendant's land calls for the doing

12. *Covington, etc., Co. v. Stein-* owner of a chimney was held liable
brock, 61 Ohio St. 215, 55 N. E. 618, for its fall, although he had hired
 76 Am. St. R. 375 and note (1899). an independent contractor to in-

13. Cf. *Cork v. Blossom*, 162 Mass. spect it, who had pronounced it
 330, 38 N. E. 495, 26 L. R. A. 256, 44 safe.

Am. St. R. 362 (1894), where the

of intrinsically dangerous work,¹⁴ in the opinion of some courts, while others entertain a contrary opinion.¹⁵ Blasting with dynamite,¹⁶ or excavating adjoining land,¹⁷ or digging trenches in highways or across foot-paths,¹⁸ is considered by most courts so dangerous an undertaking, as to impose upon the landowner or employer the non-assignable duty of seeing that the work is carefully conducted; while some courts refuse to recognize such a duty, unless the work is unlawful, or a nuisance, or the duty is imposed by statute.¹⁹

There is substantial unanimity in the view, that when a valid statute or municipal ordinance commands the observance of certain precautions in doing particular work, the work is to be deemed inherently dangerous, unless those precautions are taken. In such cases the employer is bound to see that the precautions are taken, and cannot escape responsibility by letting the work to ever so skillful or careful a contractor.²⁰ The same result follows, in

14. *Black v. Christchurch Finance Co.* (1894), A. C. 48; *Cameron v. Oberlin*, 19 Ind. App. 142, 48 N. E. 386 (1897).

15. *St. Louis Iron Mt. Ry. v. Yonly*, 53 Ark. 503, 14 S. W. 800, 9 L. R. A. 604 (1900). The court intimated that such a work might be intrinsically dangerous in some circumstances; but that the burden of showing that it was so dangerous was on the plaintiff.

16. *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 495, 28 At. 32 (1893); *Juliet v. Harwood*, 86 Ill. 110, 29 Am. R. 17 (1877). Dissenting opinion of Dwight, C., in *McCafferty v. Spuyten Duyvil, etc., Ry.*, 61 N. Y. 178, 185 (1874).

17. *Bonaparte v. Wiseman*, 89 Md. 12, 42 At. 918, 44 L. R. A. 482 (1899).

18. *Spence v. Schultz*, 103 Cal. 208, 37 Pac. 220 (1894); *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421 (1891); *McCarrier v. Hollister*, 15 S. D. 366, 89 N. W. 862, 91 Am. St. R. 695 (1902).

19. *Myer v. Hobbs*, 57 Ala. 175 (1876); *Mayor of Birmingham v. McCary*, 84 Ala. 469, 4 So. 630 (1887); *Scammon v. Chicago*, 25 Ill. 424, 79 Am. Dec. 334 (1861); *Kepperly v. Ramsden*, 83 Ill. 354 (1876); *Tibbetts v. Knox, etc., Ry.*, 62 Me. 437 (1873); *Blumb v. City of Kansas*, 84 Mo. 112 (1884); *Cuff v. Newark, etc., Ry.*, 35 N. J. L. 17, 10 Am. R. 205 (1870); *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304 (1851); *Hackett v. West. Un. Tel. Co.*, 80 Wis. 187, 49 N. W. 822 (1891).

20. *Gray v. Pullen*, 5 B. & S. 970 (1864); *Wilson v. White*, 71 Ga. 506, 51 Am. R. 269 (1883); *Atlanta, etc., Ry. v. Kimberley*, 87 Ga. 161, 13 S. E. 277, 27 Am. St. R. 231 (1891); *Hinde v. Wabash, etc., Ry.*, 15 Ill. 72 (1853); *Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451 (1892); *Houston, etc., Ry. v. Meador*, 50 Tex. 77 (1878); *Smith v. Milwaukee Build-Exch.* 91 Wis. 360, 64 N. W. 1041, 51 Am. St. R. 912 (1895).

every case where the law, whether statute or common law, imposes a special duty on the employer; such as the duty of municipal corporations to keep their streets in a reasonably safe condition for those entitled to use them,²¹ or the duty of common carriers to transport safely their passengers or freight,²² or the duty of a party to a contract to take agreed precautions in doing certain work,²³ or the duty of the owner of highly dangerous things to see that they are properly used;²⁴ or of an innkeeper to protect his guests.^{24a}

167. **Incompetent or Unfit Contractor.** There are many *dicta* to the effect that the employer is under a legal duty to exercise due care in selecting a contractor, and that he will be answerable for the contractor's torts if the latter is known to him to be unfit or incompetent for the proper execution of the work in hand, or if his manner of doing the work is known to the employer to be negligent.²⁵ This doctrine has received the express approval of at least

21. *Mayor of Birmingham v. McCary*, 84 Ala. 469, 4 So. 630 (1887); *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528 (1896); *Omaha v. Jensen*, 35 Neb. 68, 37 Am. St. R. 432 (1892).

22. *Barrow Steamship Co. v. Kane*, 88 Fed. 197, 59 U. S. App. 574 (1898). The carrier's "obligation to transport the passenger safely cannot be shifted from himself by delegation to an independent contractor, and it extends to all agencies employed, and includes the duty of protecting the passenger from any injury caused by the act of any subordinate or third person, engaged in any part of the service required by the contract of transportation. The present case is quite analogous to those in which it has been held that a railroad company is responsible for the neglect or misconduct of the servants of a sleeping-car company, whereby a passenger sustains loss or injury,

while being transported under a contract with the railroad company. *Pennsylvania Company v. Roy*, 102 U. S. 451; *Dwinelle v. N. Y. Central & Hud. Riv. R. Co.*, 120 N. Y. 117; *Railroad Co. v. Walrath*, 38 Ohio St. 461; *Kinsley v. Lake Shore and Michigan Southern Railroad Company*, 125 Mass. 54."

23. *Water Co. v. Ware*, 16 Wall. (U. S.) 566 (1872).

24. *Salisbury v. Erie Ry.*, 66 N. J. L. 233, 50 At. 117, 88 Am. St. R. 480 (1901).

24a. *Clancy v. Barker*, 71 Neb. 83, 98 N. W. 440 (1904). *Contra*, *Rahmel v. Lehndorff*, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. R. 159 (1904).

25. *Dillon v. Hunt*, 82 Mo. 155 (1884); *Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451 (1892), and authorities there cited.

26. *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 28 At. 22 (1892).

one court of last resort,²⁸ but appears to have been rejected by another.²⁷

168. Sub-Contractor's Torts. These are governed by the rules applicable to the original contractor. The sub-contractor becomes the principal in the execution of that part of the work committed to him, and for his torts, neither the original contractor, nor his employer, is liable save in the excepted cases already discussed.²⁸

169. Adoption of Torts Done on One's Behalf. Although the relation of master and servant does not exist when a particular tort occurs, that tort may be adopted by a third person, on whose behalf it is committed, so that he will be answerable therefor, precisely as though he had previously commanded it.²⁹ But the tort must have been committed on the adopting person's behalf,³⁰ or he must have received and retained the profits of it, with knowledge of all the material facts,³¹ or with an intention to adopt it at all events,³² in order to subject him to liability therefor. It is not necessary, however, that the ratification be directed specifically to the tort in question, nor that the tort taken by itself be beneficial to the adopting party.³³ In the case last cited, one McCulloch took upon himself to deliver a load of defendant's coal to plaintiff, but without authority from defendant. By McCulloch's carelessness in driving, a light of plate glass in plaintiff's window was broken. Thereafter, with knowledge of these facts, defendant presented a

27. *Berg v. Parsons*, 156 N. Y. 109, & W. 226 (1843); *Brown v. City of Webster City*, 115 Ia. 511, 88 N. W. St. R. 542 (1898), reversing S. C. 1070 (1902).

in 84 Hun, 60, 51 N. Y. Supp. 1091 (1895), where it was expressly held that the employer is bound to select a suitable and competent contractor for blasting.

28. *Overton v. Freeman*, 11 C. B. 867, 21 L. J. C. P. 52 (1852); *Beberick v. Ebach*, 131 Pa. 165, 18 At. 1008 (1890); *Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W. 691, 17 Am. St. R. 925 (1890).

29. *Serle De Lanlarazon's Case*, Y. B. 30 Ed. 1, (Roll's Series) 129 (1302); *Anonymous*, Godbolt, 109 pl. 129 (1586); *Foster v. Bates*, 12 M.

30. *Anonymous*, Y. B. 7 H. IV, 34, pl. 1 (1405-6); *Wilson v. Tumman*, 6 M. & G. 236 (1843); *Hyde v. Cooper*, 26 Vt. 552 (1854).

31. *Dunn v. Hartford, etc., Ry.*, 43 Conn. 434 (1876); *Beberick v. Ebach*, 131 Pa. 165, 18 At. 1008 (1890); *Singer Mfg. Co. v. Stephens* (Ky.), 53 S. W. 525 (1899).

32. *Freeman v. Rosher*, 13 Q. B. 780 (1849); *Lewis v. Read*, 13 M. & W. 834 (1845).

33. *Dempsey v. Chambers*, 154 Mass. 330, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. R. 249 (1891).

bill for the coal to the plaintiff and claimed that the plaintiff owed him for the same. This conduct, it was held, amounted to a ratification of McCulloch's employment; established the relation of master and servant from the beginning, with all its incidents, and rendered the defendant liable for McCulloch's negligence.

170. Evidence of Ratification. It is sometimes said that but slight evidence will be required to establish the ratification of a tort.³⁴ The statement does not seem to be a very helpful one, for the courts, which are responsible for it, have held that the retention of a servant, with knowledge of his misconduct, does not amount to an adoption of that misconduct, if it was not such as to render the master liable when it occurred.³⁵

171. Scope of Servant's Authority. We have stated that the master is generally answerable, not only for the wrongs done by his express authority, or on his behalf and ratified by him, but also for the wrongs of his servant which are done in the course of the servant's employment and of the master's business, whether authorized or not. Let us now consider these two phrases, "course of employment" and "the master's business."

In many cases, the servant's acts are so clearly within the rule that the courts have no trouble in deciding them. For example, he is sent by his master to a certain place at a certain time to kill a beef. Finding but one animal there, he kills it. The animal turns out to be a valuable thoroughbred Shorthorn bull owned by plaintiff, which the master knew nothing about. The latter had no reason to believe that this particular animal was at the place in question, but supposed a different animal would be there. Still, as the servant "killed this bull while in the execution of his master's business, and within the scope of his employment," the master is liable to the plaintiff.³⁶

³⁴ Perkins v. Mo., etc., Ry., 55 Mo. 201, 214 (1874); Brown v. City of Webster City, 115 Ia. 511, 88 N. W. 1071 (1902); Contra, Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 3 So. 631, 8 Am. St. R. 512 (1888), holding that ratification can only be inferred from acts which clearly and unequivocally evince the intention to ratify.

³⁵ Eidelmann v. St. Louis Co., 3 Mo. App. 503 (1877); Gulf, etc., Ry. v. Kirkbride, 79 Tex. 457, 15 S. W. 495 (1891).

³⁶ Maier v. Randolph, 33 Ks. 340 (1885); Moir v. Hopkins, 16 Ill. 313 (1855); Wilson v. Noonan, 27 Wis. 598 (1871), accord.

On the other hand, many acts of the servant fall so far outside the rule as to occasion the courts little if any trouble.^{36a} Clearly a teamster is not acting in the course of his employment, or in his master's business, when he invites a boy nine years old, to ride with him and take the reins, while he goes to sleep; and the master is not liable for injuries sustained by the boy while thus assisting the teamster.³⁷ Nor is a car conductor so acting when he leaves his car and assaults one with whom he has had an altercation, but who is no longer a passenger;³⁸ or assaults boys at a distance from the road, who have placed obstructions on the track.³⁹ Nor is the janitor of a building,⁴⁰ or the watchman of an ice-factory,⁴¹ or the fireman of railroad crew,⁴² so acting, when playing a practical joke on other employees of his master, or on persons invited to the premises by the servant.⁴³

Not quite so clear a case is presented, where a servant, who is set to guard property and furnished with firearms by the master, shoots without legal excuse a person who is near the property. If the person shot is not molesting the property,⁴⁴ or if he is retreat-

36a. *Houghton v. Pilkington* (1912), 3 K. B. 308, 82 L. J. K. B. 75, and cases cited: Servant invited third party to ride with him for servant's convenience or pleasure. See *Englehart v. Far-*

37. *Driscoll v. Scanlon*, 165 Mass. 348, 43 N. E. 100, 52 Am. St. R. 523 (1896). *Houston, etc., Ry. Co. v. Bolling*, 59 Ark. 395, 27 S. W. 492, 27 L. R. A. 190, 43 Am. St. R. 38 (1894); *Keating v. Mich. Cent. Ry.*, 97 Mich. 154, 56 N. W. 346, 37 Am. St. R. 28 (1893); *Schulwitz v. Delta Lumber Co.*, 126 Mich. 559, 85 N. W. 1075 (1901); *Parent v. Nashua Mfg. Co.*, 70 N. H. 199, 47 At. 261 (1900); *Faust v. Phila. & Reading Ry.*, 191 Pa. 420, 43 At. 329 (1899), accord. Had the boy negligently injured a third person, while driving for the teamster, such negligence might properly be deemed the teamster's negligence in the course of his employment. See *Englehart v. Far-*

rant & Co. (1897), 1 Q. B. 240, 66 L. J. Q. B. 122; *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695 (1860).

38. *Palmer v. Winston-Salem Electric Ry.*, 131 N. C. 250, 42 S. E. 604 (1902).

39. *Dolan v. J. C. Hubbing Co.*, 109 Ia. 108, 80 N. W. 514 (1899).

40. *Gibson v. International Trust Co.*, 177 Mass. 100, 58 N. E. 278, 52 L. R. A. 928 (1900).

41. *Canton Cotton Warehouse Co. v. Pool*, 78 Miss. 147, 28 So. 823, 84 Am. St. R. 620 (1900).

42. *Sullivan v. Louisville & N. Ry.*, 115 Ky. 447, 74 S. W. 171 (1903).

43. *Western Ry. of Ala. v. Milligan*, 135 Ala. 205, 33 So. 438 (1902).

44. *Davis v. Houghtellin*, 33 Neb. 582, 50 N. W. 765, 14 L. R. A. 737 (1891); *Holler v. P. Sanford Ross*, 68 N. J. L. 324, 53 At. 472 (1902).

ing from it,⁴⁵ or if the shooting occurs after the property has been injured and not with a view to protecting or regaining it,⁴⁶ the master is not liable. On the other hand, if the shooting is incident to measures taken by the servant for the protection of property against the person shot, the master may be liable, though the servant acted recklessly or maliciously in shooting.⁴⁷

172. A Question for the Jury. Whether the tortious conduct of a servant is within the scope of his employment and in his master's business is a question of fact, a question at times so clear and easy as to admit of but one answer. It is then disposed of by the court, as we have seen in the last paragraph.⁴⁸ Generally, however, the evidence is conflicting, or warrants more than one inference, and the question is then to be submitted to the jury with proper instructions.⁴⁹

In the Pennsylvania case, cited in the last note, "a boy eight years of age climbed on a moving wagon belonging to defendant and held on to the standard. Defendant's driver struck the boy with his whip on the hand which grasped the standard and the boy fell and was injured." The trial court nonsuited the plaintiff, on the ground that whipping the boy was an unauthorized act of defendant's servant. On appeal the judgment was reversed, the court saying: "It was for the jury to determine, under proper instructions, whether the act of the driver in causing the boy to fall from the wagon was negligent, and whether it was in the line of his duty and within the scope of his employment, so as to render his employer responsible for the Act. At the time of the accident, Larkins had the custody and management of the wagon, and was driving it

45. *Turley v. Boston Ry.*, 70 N. H. *Marshall v. Cohen*, 44 Ga. 489, 9 348, 47 At. 261 (1900); *Golden v. Am. R.* 170 (1871).

Newbrand, 52 Ia. 59, 2 N. W. 537, 35 Am. R. 257 (1879).

46. *Candiff v. Louisville, etc., Ry.*, 42 La. Ann. 477, 7 So. 601 (1890).

47. *Railway Co. v. Hackett*, 58 Ark. 381, 24 S. W. 881 (1894); *Haehl v. Wabash Ry.*, 119 Mo. 325, 24 S. W. 737 (1893).

48. *Steele v. May*, 135 Ala. 483, 33 So. 30 (1902); *Simonton v. Loring*, 68 Me. 164, 28 Am. R. 29 (1878);

49. *Brennan v. Merchant & Co.*, 205 Pa. 258, 54 At. 891 (1903); and cases in last preceding note: *Bergman v. Hendrickson*, 106 Wis. 434, 82 N. W. 304, 80 Am. St. R. 47 (1900); *Rounds v. D. L. & W. Ry.*, 64 N. Y. 129, 21 Am. R. 597 (1876); *Baltimore Consol. Ry. v. Pierce*, 89 Md. 495, 43 At. 940, 45 L. R. A. 527 (1899).

for the owner, the defendant company. The driver's control of the wagon carried with it the employer's authority to protect it and to prevent persons from getting on it, as well as to remove persons from it. It was not only the right of the driver to remove trespassers from the wagon, but also his duty to his employer to do so. He therefore was authorized to eject the boy from the wagon, and could use the necessary force for that purpose. If his act in striking the boy was intended to remove him by force from the wagon, it would be the act of his employer, for which the latter would be responsible. If, on the other hand, the purpose of the driver was not to cause the boy to leave the wagon, but to inflict punishment upon him, to gratify the ill will of the driver, the defendant company is not responsible for the wrongful or tortious act. It would not be an act done by the employee in the execution of his employer's business, although it was performed while he was in the service of the employer. It would be an act of the employee directed against the boy, independently of the driver's contract of service, and in no way connected with or necessary for the accomplishment of the purpose for which the driver was employed. The negligent performance of the act, therefore, would impose no liability on the employer."⁵⁰

173. Acts Not Within the Particular Servant's Course of Employment. Rarely does a servant's employment extend to every branch and ramification of his master's business. Ordinarily, it is limited to a specific class of acts or line of work.⁵¹ A "barman and cellarman in a public house," in England, is not the general manager of the master's business there carried on, and is not acting in the course of his employment in causing the arrest of one whom

⁵⁰. *Pierce v. N. C. Ry. Co.*, 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316 (1899); *Cook v. Southern Ry.*, 128 N. C. 333, 38 S. E. 925 (1901), accord. from plaintiff. See *Western U. Tel. Co. v. Mullins*, 44 Neb. 733, 62 N. W. 880 (1895); *Western U. T. Co. v. Foster*, 64 Tex. 220, 53 Am. R. 754 (1895); *Baker v. Kinsey*, 38 Cal. 631, 99 Am. Dec. 438 (1869); *Weldon v. Harlem Ry. Co.*, 5 Bosw. (N. Y.) 576 (1859); *Aldrich v. Boston, etc., Ry.*, 100 Mass. 31, 1 Am. R. 76 (1868); *Haskell v. Boston Dist. M. Co.*, 190 Mass. 189, 76 N. E. 215 (1906).

⁵¹. *Graham v. St. Charles, etc., Ry.*, 47 La. Ann. 1656, 49 Am. St. R. 436, 18 So. 707 (1895). A foreman of a railroad company, employed to hire, oversee and discharge laborers, is not acting in the course of his employment in inducing employees to withdraw their trade

he suspects of having stolen whiskey from the cellar.⁵² Nor, it has been held, is a clerk in a store so acting, when he orders the arrest of a customer on suspicion of theft.⁵³ The prevailing view in this country, however, is that, if the master's manner of conducting his business justifies the jury in believing that the servant, in causing the arrest, was acting within the scope of his employment, and discharging the ordinary duties imposed upon him, the master is liable.⁵⁴ Otherwise, he is not liable.^{54a}

It has also been held that the section foreman of a railway company is not acting within the scope of his employment in lending a hand-car to boys, for the purpose of going along the track to a swimming place, and hence the company is not liable for injuries sustained by the boys while using it.⁵⁵ Had a third person been run over by the car through the boys' negligence, the company might well have been held liable; for guarding such an instrument of danger and keeping it from the hands of untrained boys was within the course of the foreman's employment.⁵⁶

Again, a person's servant is not acting within the scope of his employment when lighting a pipe which he is accustomed to smoke while working; and for damage caused by the servant's negligence in lighting his pipe, the master is not answerable.⁵⁷

⁵² *Hanson v. Waller* (1901), 1 Q. 77 C. C. A. 536 (1906).

B. 390, 70 L. J. Q. B. 231.

⁵³ *Mall v. Lord*, 39 N. Y. 381, 100 N. J. L. 233, 50 At. 187, 55 L. R. A. Am. Dec. 448 (1868).

⁵⁴ *Craven v. Bloomingdale*, 171 N. Y. 439, 64 N. E. 169 (1902); *Pennsylvania Co. v. Weddle*, 100 Ind. 138 (1884); *Staples v. Schmid*, 18 R. I. 225, 26 At. 193, 19 L. R. A. 824 (1893); *Daniel v. Atlantic Coast Line*, 136 N. C. 517, 48 S. E. 816 (1904).

^{54a} *Collins v. Butler*, 179 N. Y. 156, 71 N. E. 746 (1904), applies this doctrine to an assault by defendant's servant on the plaintiff.

⁵⁵ *Robinson v. McNeill*, 18 Wash. 163, 51 Pac. 355 (1897); *St. Louis I. Mt. & S. Ry. v. Robinson*, 95 Ark. 39, 128 S. W. 60 (1910); *St. Louis S. W. Ry. v. Harvey*, 144 Fed. 806,

⁵⁶ *Erie Ry. Co. v. Salisbury*, 66 N. J. L. 233, 50 At. 187, 55 L. R. A. 578 (1901). "When the company placed the push car in the hands of the foreman, it was the duty of the foreman to use it with reasonable care to prevent injury to anyone lawfully on the tracks, and to keep it under his own supervision until it was returned. * * * The obligation to see that this duty is performed is cast upon the railroad."

⁵⁷ *Williams v. Jones*, 3 H. & C. 256, 602, 33 L. J. Exch. 297, 13 L. T. N. S. 300 (1864). *S. P., Walton v. N. Y., etc., Co.*, 139 Mass. 556 (1885). Defendant not liable for damages done to a person who was hit by a bundle thrown by a car porter; the bundle belonging to the

174. Acts Not Done in the Master's Business. Harm is often inflicted upon third persons by acts of a servant, which are within the course of his particular employment, and yet for this harm the master is not answerable. For example, A is the coachman of defendant. It is therefore within the course of his employment to drive defendant's horses. Plaintiff is injured by reason of A's negligent driving of defendant's horses. Whether he has a cause of action against defendant for the damages depends upon whether A was engaged in defendant's business at the time. If it appears that A took the horses out and was driving them for his own purposes, and without authority from defendant, the latter is not liable to plaintiff.⁵⁸ If, on the other hand, A was driving them,⁵⁹ or charged with their custody,⁶⁰ in the business of defendant,⁶¹ the latter is liable, although the particular conduct of A, causing the harm, was in violation of the defendant's orders,⁶² or was even willful and malicious.⁶³

porter and being thrown for his own purposes. *S. P., Walker v. Hannibal, etc., Ry.*, 121 Mo. 575, 26 S. W. 360, 42 Am. St. R. 547 (1894).

58. *Rayner v. Mitchell*, 2 C. P. D. 357 (1877); *Fiske v. Enders*, 73 Conn. 338, 47 At. 681 (1900); *Maddox v. Brown*, 71 Me. 432, 36 Am. R. 336 (1880); *Campbell v. Providence*, 9 R. I. 262 (1869); *Way v. Powers*, 57 Vt. 135 (1884). Same doctrine applied to chauffeur, and to defendant's agent using the auto outside of defendant's business, in *Fleischer v. Durgin*, 207 Mass. 435, 93 N. E. 801 (1911); *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133, 5 L. R. A. N. S. 598 (1906).

59. *Ritchie v. Waller*, 63 Conn. 156, 28 At. 29, 27 L. R. A. 161, 38 Am. St. R. 361 (1893). Cf. *Stone v. Hills*, 45 Conn. 44, 29 Am. R. 635 (1877), where the servant, after driving to the destination named by the master, took new directions from a third party, and, while doing the business of such third party,

negligently injured plaintiff. The master was not liable therefor.

60. *Whatman v. Pearson*, L. R. 3 C. P. 422, 37 L. J. C. P. 156 (1868); *Englehart v. Farrant & Co.* (1897), 1 Q. B. 240, 66 L. J. Q. B. 122.

61. In some jurisdictions, a temporary departure from the master's business, such as driving to a saloon for a drink, instead of returning to the master's stable, relieves the master from liability for the driver's negligence, during such period. *McCarty v. Timmins*, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. R. 490 (1901); *Perlstein v. Am. Ex. Co.*, 177 Mass. 530, 59 N. E. 184, 52 L. R. A. 959 (1901); *Sheridan v. Charllick*, 4 Daly (N. Y.) 338 (1872); *Cavanagh v. Dinsmore*, 12 Hun (N. Y.) 465 (1878).

62. *Limpus v. London, etc., Co.*, 1 H. & C. 526, 32 L. J. Exch. 34 (1862).

63. *Cohen v. Dry Dock Ry. Co.*, 69 N. Y. 170 (1877); *Baltimore Consol. Ry. v. Pierce*, 89 Md. 495, 43 At. 940,

The principles laid down in the decisions just referred to, are applicable to all cases involving the liability of the master for the wrongful and unauthorized acts of his servant. Although those acts are done while the actor is engaged in the master's employment, they will not render the master liable, unless they were done in his business. A few examples will suffice to illustrate this proposition. A railroad conductor strikes a passenger unnecessarily as he is attempting to board the train. If the force is used in the management of the passengers in leaving and entering the train, the master will be liable,⁶⁴ although, by misjudgment or violence of temper, the servant goes beyond the necessity of the occasion.⁶⁵ On the other hand, if force is applied as an incident to reckless horse-play between the conductor and a third person, the master will not be liable,⁶⁶ nor will he be liable for injuries sustained by a policeman, in consequence of a joke played upon him, by a conductor while off duty.^{66a}

Again, the ticket agent of a railroad company causes the arrest of a ticket purchaser, for passing counterfeit money for the ticket. It turns out that the money was genuine. The railroad company will be liable if the arrest is made in the prosecution of the master's business,⁶⁷ but not if it is made for the purpose of aiding the public authorities in bringing a supposed criminal to justice.⁶⁸ The

45 L. R. A. 527; *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 231-235, 19 So. 1, 31 L. R. A. 193, 55 Am. St. R. 930 (1895); *City Delivery Co. v. Henry*, 139 Ala. 161, 34 So. 389 (1903). 729, 54 Am. St. R. 67 (1894); *Lynch v. Florida Central Ry.*, 113 Ga. 1105, 39 S. E. 411, 54 L. R. A. 810 (1901). A quarrel between plaintiff and defendant's station agent grew out of, but was directly

64. *McFarlan v. Penn. Ry.*, 199 Pa. 408, 49 At. 270 (1901). He may be liable though the assault is upon a trespasser. *Rowell v. Boston, etc., Ry.*, 68 N. H. 358, 44 At. 486 (1895). connected with the agent's discharge of his duties to the defendant; *Little Miami Ry. Co. v. Westmore*, 19 Ohio St. 110, 2 Am. R. 373 (1869).

65. *Rounds v. D. L. & W. Ry.*, 64 N. Y. 129, 21 Am. R. 597 (1876). S. P., *Evans v. Davidson*, 53 Md. 245, 36 Am. R. 300 (1880); *Nelson Business College v. Lloyd*, 60 Ohio St. 448, 54 N. E. 471, 71 Am. St. R. 729, 46 L. R. A. 314 (1899). 66a. *Berry v. Boston Elevated Ry.*, 188 Mass. 536, 74 N. E. 933 (1905). 67. *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261, 30 N. E. 1001, 28 Am. St. R. 632, 16 L. R. A. 136 (1892); *McDonald v. Franchere Brothers*, 102 Ia. 496, 71 N. W. 427 (1897).

66. *Goodloe v. Memphis, etc., Ry.*, 107 Ala. 233, 18 So. 166, 29 L. R. A. 68. *Mulligan v. N. Y., etc., Ry.*, 129 N. Y. 506, 29 N. E. 952, 26 Am. St.

same doctrine applies to assaults made by servants while in the defendant's employ. If committed in prosecuting the defendant's business, he is liable, although he may have forbidden such conduct, and although the servant's dominant motive at the moment of assault was to inflict harm on the plaintiff, rather than to benefit the defendant.⁶⁹ But if the servant commits the assault to redress a personal grievance, or to save himself from loss, the master will not be liable.⁷⁰ Whether the servant is acting in the master's business, when inflicting the harm, may be a question for the jury.^{70a}

In admiralty a ship may be liable for the wrong-doing of a servant, though he is not acting within the scope of his authority.^{70b}

175. Willful, Malicious and Fraudulent Acts of Servant. There is much authority in the earlier cases for the view, that such acts do not subject the master to liability. Lord Kenyon declared⁷¹ that "when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such act." Judge Cowen asserted,⁷² "all the cases agree that

R. 539, 14 L. R. A. 791 (1892); *Tolchester, etc., Co. v. Steinhilber*, 72 Md. 313, 20 At. 189, 8 L. R. A. 846 (1890); *Lafitte v. New Orleans, etc., Ry.*, 43 La. Ann. 34, 8 So. 701, 12 L. R. A. 337 (1891).

^{69.} *Williams Adm'r v. Southern Ry. Co.*, 115 Ky. 320, 73 S. W. 779 (1903). "The instructions were erroneous and misleading in the use of the words 'not done in the interest and business of the defendant', instead of the words 'not done in the line of his employment,' and 'while acting within the scope of his authority.'" *Smith v. L. & N. Ry.*, 95 Ky. 11, 23 S. W. 652, 22 L. R. A. 72 (1893); *Dorsey v. Kansas, etc., Ry.*, 104 La. 478, 29 So. 177, 52 L. R. A. 92 (1900); *Girvin v. N. Y. C., etc., Ry.*, 166 N. Y. 289, 59 N. E. 921

(1901); *Bergman v. Hendrickson*, 106 Wis. 434, 82 N. W. 304, 80 Am. St. R. 47 (1900).

^{70.} *McDermott v. Am. Brewing Co.*, 105 La. 124, 29 So. 498, 83 Am. St. R. 428 (1901); *Williams v. Pullman Car Co.*, 40 La. Ann. 89, 3 So. 635, 8 Am. St. R. 512 (1888); *Everingham v. Chicago, B. & Q. Ry.*, 148 Ia. 662, 127 N. W. 1009 (1910).

^{70a.} *Shoop v. Erie Ry.*, 184 N. Y. 100, 76 N. E. 923 (1906), especially if the answer depends upon the credibility of witnesses.

^{70b.} *The Bulley*, 138 Fed. 170 (1905), 5 Columbia Law Rev. 545.

^{71.} *McManus v. Crickett*, 1 East 106, 5 R. R. 518 (1800).

^{72.} *Wright v. Wilcox*, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507 (1838).

a master is not liable for the willful mischief of his servant, though he be at the time, in other respects; engaged in the service of the former." The tendency of later decisions, both in England and in this country, is to discard this doctrine, and to hold the master liable for his servant's willful, malicious and fraudulent misfeasance, if it was in the course of his employment and in the furtherance of the master's business.⁷³ The foundation of the modern doctrine is that "if one of two innocent persons must suffer from a wrong, it is better that it should befall the third person to do such act should be compelled to sustain the loss occasioned by its commission."⁷⁴

73. This has appeared in the preceding pages. Additional cases might be cited in great numbers. In the following, the topic is well discussed. *Strang v. Bradner*, 114 U. S. 555, 29 L. Ed. 245, 5 Sup. Ct. 1033 (1884); innocent partner liable in deceit for fraudulent misrepresentations of a copartner. For other cases in accord, see *Burdick on Partnership*, pp. 203-214; *Bank of Cal. v. West U. Tel. Co.*, 52 Cal. 280 (1877); *McCord v. W. U. T. Co.*, 39 Minn. 181, 39 N. W. 315, 1 L. R. A. 143, 12 Am. St. R. 637 (1888); *Elwood v. W. U. T. Co.*, 45 N. Y. 549, 6 Am. R. 140 (1871); *Bank of Palo Alto v. Pac. Postal Tel. Co.*, 103 Fed. 841, holding the telegraph company liable for willful and fraudulent acts of its servant in sending telegrams; *Wheeler v. Baars*, 33 Fla. 696, 16 So. 584 (1894); *McArthur v. Home Life Assurance*, 73 Ia. 36, 35 N. W. 540, 5 Am. St. R. 684 (1887); *Rhoda v. Annis*, 75 Mo. 17, 46 Am. R. 354 (1883); *Haskell v. Starbird*, 152 Mass. 117, 25 N. E. 14, 23 Am. St. R. 809 (1890); *Busch v. Wilcox*, 82 Mich. 336, 47 N. W. 328, 21 Am. St. R. 563 (1890), innocent master held liable in tort for fraudulent misrepresentations of servant; *Stranahan Bros. Catering Co. v. Colt*, 55 Ohio St. 398, 45 N. E. 634 (1896), holding the master liable for the servant's adulteration of milk, although the latter adulterated it to gratify his malice against the master and to injure him. This decision is rested in part upon the fact, that the master had contracted with the plaintiff to supply pure milk; *Dyer v. Munday* (1895), 1 Q. B. 742, 64 L. J. Q. B. 448, holding master liable for servant's assault, although the latter had been punished as a criminal offense.

74. *Pac. Postal Tel. Co. v. I. Palo Alto*, 109 Fed. 369, 48 C. 413 (1901); *Gassenheimer v. Ry. of Ala.*, — Ala. —, 57 S. 40 L. R. A. N. S. 945 with express note (1912); *Conchin v. El S. W. Ry.*, 13 Ariz. 259, 108 F. (1910); *Hamilton v. Chicago, M. & St. P. Ry.*, 119 Ia. 650, 93 N. W. 594 (1903); *Neuer v. Met. St. Ry.*, 143 Mo. App. 402, 127 S. (1910); *Swinerton v. Le I. 7 Misc. 639, 28 N. Y. Supp. 1* affd. without opinion 148 1 43 N. E. 990 (1896), *Ve* \$10,000 sustained; plaintiff was put out by a pin flipped by a cash boy, defendant held to strin-

A master does not ratify the misconduct of a servant, which was not within the scope of his authority, by merely retaining him as a servant.^{74a}

176. False Imprisonment and Malicious Prosecution by Servant. Applying the doctrine in the foregoing paragraph, the master has been held liable for the false imprisonment of persons by his servant, and for the malicious prosecution instituted in his name by his servant, not only when such proceedings were expressly authorized or ratified, but also when the servant's authority to act was fairly inferable from the nature and scope of his employment.⁷⁵ On the other hand, the master has escaped liability, where it appeared that the servant was not acting in the course of his employment, or in a manner ordinarily conducive to his master's interests, but was performing the functions of a citizen in seeking to bring the criminals to punishment.⁷⁶

177. Master's Liability for Torts of Servant, which Are Not in the Course of His Employment. This exceptional liability of the master results from a special legal duty resting upon him, in certain circumstances.^{76a} In some cases, that duty is imposed upon

gent duty of guarding its patrons; *L. R. A.* 702, 54 *Am. St. R.* 833 *Magar v. Hammond*, 183 *N. Y.* 387, (1896); *Moore v. Met. Ry.*, *L. R.* 8 76 *N. E.* 474, 3 *L. R. A. N. S.* 1038 *Q. B.* 36, 42 *L. J. Q. B.* 23 (1872); with case note (1906); *Hyman v. Schmidt v. New Orleans Ry.*, 116 *Tilton*, 208 *Pa.* 641, 57 *At.* 1124 *La.* 311, 40 *So.* 714, 7 *L. R. A. N. S.* (1904), boy knocked off from wagon 162 (1906).

by defendant's driver; *Neville v. 76. Page v. Citizens Banking Co., Southern Ry., Tenn.*, 146 *S.* 111 *Ga.* 73, 36 *S. E.* 418, 51 *L. R. A. W.* 846, 40 *L. R. A. N. S.* 995 (1912). 463, with valuable note (1900); *Tol-*

74a. *Everingham v. Chicago, B. & chester Co. v. Steinmeir*, 72 *Md. Q. Ry.*, 148 *Ia.* 662, 127 *N. W.* 1009 313, 20 *At.* 188, 8 *L. R. A.* 846 (1910). (1890); *Mulligan v. N. Y., Etc. Ry.*,

75. *Krulevitz v. Eastern Ry.*, 140 129 *N. Y.* 506, 29 *N. E.* 952, 14 *L. R. Mass.* 573, 5 *N. E.* 500 (1886); *Pal-* *A.* 791, 26 *Am. St. R.* 539 (1892); *meri v. Manhattan Ry.*, 133 *N. Y.* *Croasdale v. Van Boyneburg*, 206 261, 30 *N. E.* 1001, 16 *L. R. A.* 136, *Pa.* 15, 55 *At.* 770 (1903); *Markley* 54 *Am. St.* 632 (1892); *Kelly v.* *v. Snow*, 207 *Pa.* 447, 56 *At.* 999 *Traction Co.*, 132 *N. C.* 368, 43 *S.* (1904); *Abraham v. Deakin* (1891), *E.* 923 (1903); *Staples v. Schmid*, 18 1 *Q. B.* 516, 60 *L. J. Q. B.* 238.

R. I. 224, 26 *At.* 193, 19 *L. R. A.* 824 **76a.** *Swinarton v. Le Boutillier*, 7 (1893); *Elchengreen v. Louisville Misc.* 639, 28 *N. Y. Supp.* 53 (1894), *Ry.*, 96 *Tenn.* 229, 34 *S. W.* 219, 31 148 *N. Y.* 752, 43 *N. E.* 990 (1896),

latter adulterated it for the sole purpose of gratifying his spite him by contract. A master who contracts to deliver pure milk to a cheese and butter factory, is liable in damages to the factory proprietor for the adulteration of the milk by a servant, although the against the master.⁷⁷ A common carrier contracts not only to transport his passengers, but to use every reasonable effort to transport them safely. This contract, and the common law duty incident thereto, often render the carrier liable for his servant's torts, which are committed without a shadow of authority, and wholly outside of the master's business. Nothing could be further removed from the course of a railroad conductor's employment, or from the carrier's business, than the kissing of female passengers, and yet the carrier must answer in tort for the assault and battery of a conductor who kisses a female passenger against her will.⁷⁸ So he must answer for any tortious conduct of his servants towards passengers, which violates his duty towards them.⁷⁹ This duty ex-

duty of department store to guard its patrons against recklessness of cash boys in snapping pins at each other.

77. *Stranahan Bros. Co. v. Colt*, 55 Ohio St. 398, 45 N. E. 634 (1896). The court expressed the opinion that the servant's act in adulterating the milk was within the scope of his employment; but it also declared that the master's contractual relations with plaintiff determined the scope of the employment. *Pittsfield Cottonware Co. v. Pittsfield Shoe Co.*, 71 N. H. 522, 53 At. 807, 60 L. R. A. 116 (1902); *Steele v. May*, 135 Ala. 483, 33 So. 30 (1902).

78. *Craker v. Chicago & N. W. Ry.*, 36 Wis. 657, 17 Am. R. 504 (1875).

79. *Birmingham Ry. v. Baird*, 130 Ala. 334, 30 So. 456, 89 Am. St. R. 43 (1901); *Savannah, etc., Ry. v. Quo*, 103 Ga. 125, 29 S. E. 607, 68 Am. St. R. 85 (1897); *Keokuk, etc., Co. v. True*, 88 Ill. 608 (1878); *Chicago, etc., Ry. v. Flexman*, 103 Ill.

546, 42 Am. R. 33 and note (1882); *McKinley v. Chicago & N. W. Ry.*, 44 Ia. 314, 24 Am. R. 748 (1876); *Wabash Ry. v. Savage*, 110 Ind. 156, 9 N. E. 85 (1886); *Missouri Pac. Ry. v. Divinney*, 66 Ks. 776, 71 Pac. 855 (1903); *Spangler v. St. Joseph, etc., Ry.*, 68 Ks. 46, 74 Pac. 607, 63 L. R. A. 634 (1903); *Shirley v. Billings*, 8 Bush (71 Ky.) 147, 8 Am. R. 451 (1871); *Goddard v. Grand Tk. Ry.*, 57 Me. 202, 2 Am. R. 39 (1869); *Bryant v. Rich*, 106 Mass. 180, 8 Am. R. 311 (1870); *New Orleans, etc., Ry. v. Burke*, 50 Miss. 200 (1874); *Dwinell v. N. Y. C. Ry.*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. R. 611 (1890); *Haver v. Cent. Ry.*, 62 N. J. L. 282, 41 At. 916, 43 L. R. A. 84, 72 Am. St. R. 647 (1898); *White v. Norfolk, etc., Ry.*, 115 N. C. 631, 20 S. E. 191, 44 Am. St. R. 489 (1894); *Seawell v. Car. Cent. Ry.*, 133 N. C. 515, 44 S. E. 610 (1903); *Dillingham v. Russell*, 73 Tex. 47, 11 S. W. 139, 15 Am. St. R. 753, 3 L. R. A.

tends to the exercise of a high degree of care in guarding them against the assaults of strangers.⁸⁰ He is not an insurer of their safety⁸¹ against other passengers, or outsiders, nor even against his servants, but he is bound to use every reasonable effort to maintain order and discipline among his servants, as well as among passengers and those who are upon his premises and conveyances.⁸²

A similar duty rests upon the proprietor of a liquor saloon, or other place where intoxicants are publicly sold.⁸³ He has "the undoubted right to exclude therefrom drunken and disorderly persons, and the right to remove and expel them when they become in that condition and disorderly, and likely to produce discord and brawls. Being clothed with such power, a corresponding duty to do so in the interests of law and order, and for the protection of his other guests, should be imposed as a matter of law."⁸⁴ Some courts, however, are disposed to hold innkeepers to a less rigorous liability; to a liability only for the acts of servants done within the scope of their authority;^{84a} while others treat them as virtual insurers of their guests against misdoing servants.^{84b}

Again, a person who puts into the hands of a servant a dangerous instrumentality, is under a common-law duty to see that the ser-

634. (1889); Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549 (1899).

80. Chic. & A. Ry. v. Pillsbury, 123 Ill. 9, 14 N. E. 22, 5 Am. St. R. 483 (1887); Snow v. Fitchburg Ry., 136 Mass. 552, 49 Am. R. 40 (1884); Carpenter v. Boston & A. Ry., 97 N. Y. 494, 49 Am. R. 540 (1884).

81. Fritz v. Southern Ry., 133 N. C. 725, 44 S. E. 613 (1903).

82. Mullan v. Wis. Ry. Co., 46 Minn. 475, 49 N. W. 249 (1891); New Orleans, etc., Ry. v. Burke, 53 Miss. 200, 24 Am. R. 689 (1876).

83. Curran v. Olson, 88 Minn. 307, 92 N. W. 1124, 60 L. R. A. 733, 97 Am. St. R. 517 (1903).

84. Mastad v. Sweedish Brethren, 83 Minn. 40, 85 N. W. 913, 53 L. R. A. 803 (1901); Rommel v. Schambacker, 120 Pa. 579, 11 At. 779, 6

Am. St. R. 782 (1887). Contra, Belding v. Johnson, 86 Ga. 177, 12 S. E. 304, 11 L. R. A. 53 (1890); Peter Anderson & Co. v. Diaz, 77 Ark. 606, 92 S. W. 861, 4 L. R. A. N. S. 649 (1906).

84a. Rahmel v. Lehdorff, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. R. 154 (1904); Clancy v. Barker, 131 Fed. 161, 66 C. C. A. 469 and note, dissenting opinion by Thayer, 69 L. R. A. 653 (1904).

84b. Morris Hotel Co. v. Henley, 145 Ala. 678, 40 So. 52 (1906); Clancy v. Barker, 71 Neb. 83, 98 N. W. 440 (1904); 71 Neb. 91, 102 N. W. 446, 69 L. R. A. 642, 115 Am. St. R. 559 (1905); De Wolf v. Ford, 198 N. Y. 297, 86 N. E. 527, 21 L. R. A. N. S. 860 (1908); Lehnert v. E. J. Hines & Co., Kan. —, 127 Pac. 612 (1912).

vant properly guards or uses it.⁸⁵ A parent is under a similar duty when he places dangerous instruments in the hands of his children, although they are not his servants in dealing with them.⁸⁶

178. **Tort Liability of Master to Servant.** This is measured by the master's legal duty towards his servant. For any unjustifiable invasion of the servant's personal rights, the master is answerable precisely as he would be to a stranger.⁸⁷ In some cases,—rather rare at the present time,—the master is entitled to discipline a servant,⁸⁸ and, within certain limits, to defame him.⁸⁹ But, as a rule, a master is under the same legal duty to refrain from harming his servant that rests upon him towards strangers.⁹⁰

85. *Tex., etc., Ry. v. Scoville*, 62 (1902); *Odin Coal Co. v. Den-*
Fed. 730, 23 U. S. App. 506, 10 C. C. man, 185 Ill. 413, 57 N. E. 192, 76
A. 479, 27 L. R. A. 179 (1894); *Al-*
sever v. Minn., etc., Ry., 115 Ia. 338, Am. St. R. 45 (1900); *Lorentz v.*
88 N. W. 841, 56 L. R. A. 748 (1902); *Robinson*, 61 Md. 64 (1883); *Trox-*
Pittsburg, etc., Ry. v. Shields, 47 O. ler v. So. Ry., 124 N. C. 189, 32
St. 387, 24 N. E. 658, 8 L. R. A. 464, S. E. 550, 44 L. R. A. 313, 70 Am.
21 Am. St. R. 840 (1890); *Cobb v.* St. R. 580 (1899); *Russell v. Day-*
Columbia, etc., Ry., 37 S. C. 194, 15 ton Coal Co., 109 Tenn. 43, 70 S. W.
S. E. 878 (1892); *Erie Ry. Co. v.* 1 (1902); *Norfolk, etc., Ry. v. Hou-*
Salisbury, 66 N. J. L. 233, 50 At. chins, 95 Va. 398, 28 S. E. 578, 46
117, 55 L. R. A. 578 (1901); *Euting* L. R. A. 359, 64 Am. St. R. 791
v. Chic. & N. W. Ry., 116 Wis. 13, 42 (1897).

88. *The Agincourt*, 1 Hagg. 271
(1824); *Butler v. McClellan*, 1 Ware
(U. S.) 220 (1831); *The Stacy*
Clarke, 54 Fed. 533 (1892). See
Masters of Vessels, 20 Am. & Eng.
Enc. of Law, pp. 203-207 (2d Ed.).
89. *Child v. Affleck*, 9 B. & C. 403
(1829).

90. In some cases, the fact of an
accident carries with it no pre-
sumption of negligence on the part
of the master towards his injured
servant, although it would towards
certain others, such as passengers,
in whose behalf there is *prima facie*
a breach of his contract to carry
safely. *Patton v. Texas, etc., Ry.*,
179 U. S. 658, 21 Sup. Ct. 275 (1900).

86. *Chaddock v. Plummer*, 88
Mich. 225, 50 N. W. 135, 14 L. R. A.
675 with note (1891).

87. *Loveless v. Standard Gold*
Mn. Co., 116 Ga. 427, 42 S. E. 741

SPECIAL DUTIES OF MASTER TOWARDS SERVANT.

179. (1) **To Employ Suitable Fellow Servants.** The relationship between them imposes upon the master certain special duties towards the servant, which may be classified as follows: First, to use reasonable care in selecting suitable and sufficient co-servants, including superintendents.^{90a} He is not a guarantor of their competency and fitness. He is bound to exercise due care, however, in securing a sufficient number of competent servants;⁹¹ but if, after such due care, injury happens to a servant through the unfitness or negligence of a fellow servant, the master is not liable therefor.⁹² Of course, if the master is informed of a servant's incompetency, and thereafter retains him, he is violating his duty towards other servants and may be liable to them in damages;⁹³ provided, the injury is due to the incompetence or unfitness of the servant in question.⁹⁴ The burden of proof, however, is upon the plaintiff

90a. *Flike v. B. & A. Ry.*, 53 N. 1 Neg. & Comps. Cases Ann. 142, Y. 549 (1873). Defendant had appointed sufficient brakemen to go with the train which parted and caused the injury, but one of them neglected to go. The negligence of the company consisted in not seeing to it that the train was sufficiently manned when it started, and it did not excuse itself by showing that if Loftus, the brakeman, had done his duty, the train would have been fully manned. The employer, not the co-employee of Loftus, assumed the risk of the latter's neglect of duty.

91. *Louisville, etc., Ry. Co. v. Davis*, 91 Ala. 487, 8 So. 552 (1890); *Kelly v. New Haven Steamboat Co.*, 74 Conn. 343, 50 At. 871 (1902); *Louisville, etc., Ry. v. Semonis*, (Ky.), 51 S. W. 612 (1899); *Cheney v. Ocean Steamship Co.*, 92 Ga. 726, 19 S. E. 33, 44 Am. St. R. 113 (1893); *Portance v. Lehigh Valley Co.*, 101 Wis. 574, 579, 77 N. W. 875, 70 Am. St. R. 932 (1899); *Engelking v. City of Spokane*, 59 Wash. 446, 110 Pac. 25,

1 Neg. & Comps. Cases Ann. 142, 29 L. R. A. N. S. 481 (1910).

92. *The Antonio Zambrana*, 89 Fed. 60 (1898); *Weeks v. Sharer*, 111 Fed. 330, 49 C. C. A. 372 (1901); *Relyea v. Kansas City Ry.*, 112 Mo. 86, 20 S. W. 480 (1892); *Reichel v. N. Y. Cent. Ry.*, 130 N. Y. 682, 29 N. E. 763, 42 N. Y. St. R. 510 (1892).

93. *Metropolitan, etc., Co. v. Fortin*, 203 Ill. 454, 67 N. E. 977 (1903); *Brown v. Levy*, 108 Ky. 163, 55 S. W. 1079 (1900); *Norfolk & W. Ry. v. Hoover*, 79 Md. 253, 29 At. 994, 25 L. R. A. 710 and note, 47 Am. St. R. 392 (1894); *Lamb v. Littman*, 128 N. C. 361, 38 S. E. 911, 53 L. R. A. 852 (1901); *Furlong v. N. Y., N. H. & H. Ry.*, 83 Conn. 568, 78 At. 489 (1910), affirming judgment for \$4,000.

94. *Norfolk, etc., Ry. v. Phillips*, 100 Va. 362, 41 S. E. 726 (1902); *Gilman v. Eastern Ry. Co.*, 10 All. (Mass.) 233 (1865); *Metropolitan El. Ry. v. Fortin*, 203 Ill. 454, 67 N. E. 977 (1903), affirming a judgment for \$15,000 in the employee's

to show the master's negligence in selecting or continuing incompetent servants. The mere fact that they turn out to be incompetent does not tend to establish a *prima facie* case of negligence on the master's part.⁹⁵ Nor is the master liable, if the servants are injured by the negligence of a superintendent whom they force upon the master.^{95a}

180. (2) **Duty to Establish and Promulgate Proper Rules.** That this duty rests upon the master, whenever such rules are feasible and will serve to minimize the risk of a hazardous employment, is well settled. If the business involves no exercise of peculiar skill, nor the use of dangerous machinery, nor extra hazard to the servant, rules for the performance of the work are unnecessary.⁹⁶ In other lines of business it may be a question for the jury, whether rules and regulations should be made and enforced.⁹⁷ In still others, the conditions may be so complex and the hazard to the servant so great, that the master's failure to establish proper rules and to insist upon their observance will amount to a clear violation of his legal duty.⁹⁸ Perhaps no better state-

favor; *Walker v. Bolling*, 22 Ala. 294 (1853); *Cook v. Parham*, 24 Ala. 21 (1853); *Brown v. Levy*, 108 Ky. 163, 55 S. W. 1079 (1900); *Poirier v. Carroll*, 35 La. Ann. 699 (1883), recovery for \$2,500; *Laning v. N. Y. Cent. Ry.*, 49 N. Y. 521 (1872), sustaining a verdict for \$10,000.

95. *Stafford v. Chicago B. & T. Ry.*, 114 Ill. 244 (1885); *Roblin v. Kansas City, etc., Ry.*, 119 Mo. 476, 24 S. W. 1011 (1894); *The Elton*, 142 Fed. 367, 73 C. C. A. 467 (1906).

95a. *Farmer v. Kearney*, 115 La. 722, 39 So. 967, 3 L. R. A. N. S. 1105, 6 Columbia L. Rev. 352 (1905).

"When the workmen delegate to a labor organization which they have joined (and to others in privity with their own organization) the right of selection and superintendence, they agree to accept the membership of their fellow workmen in those organizations, and the action of those

associations, *ipso facto*, as a good and sufficient guaranty to them for their individual safety and protection, so far as the contractor is concerned. If they deem membership in organizations as conferring benefits upon them, they cannot accept the benefits and repudiate the resulting legal disadvantages."

96. *Texas, etc., Ry. v. Echos*, 87 Tex. 339, 27 S. W. 60 (1894); *Olsen v. Nor. Pac. L. Co.*, 40 C. C. A. 427, 100 Fed. 384 (1900); *Gila Valley, etc., Ry. v. Lyon (Ariz.)*, 71 Pac. 957 (1903); *Morgan v. Hudson, etc., Ore Co.*, 133 N. Y. 666, 31 N. E. 234 (1892).

97. *McGovern v. Central Vt. Ry.*, 123 N. Y. 280, 25 N. E. 373 (1890); *Ford v. Lake Shore, etc., Ry.*, 124 N. Y. 493, 26 N. E. 1101, 12 L. R. A. 454 (1891).

98. *Kansas City Ry. v. Hammond*, 58 Ark. 324, 24 S. W. 723 (1894);

ment of the principles, defining and regulating this duty, has been made than the following:⁹⁹ "The duty of a master in making rules is measured by the law of ordinary diligence. That law varies with the situation, for what would be ordinary diligence under one set of facts would be negligence in another. If, however, under the circumstances of a particular case, the master has met the obligation of ordinary diligence in making and enforcing a rule, he is free from liability,¹⁰⁰ even if some other rule would have been safer and better. The law requires him to make and promulgate reasonably safe and proper rules, and if he does so he is not liable, even if he might have made safer and more effective rules." But, if he fails in performing this duty, through the negligence of a servant to whom its performance is committed, the master is liable to other servants whose injuries are due to such failure.^{100a}

181. Test of Sufficiency of Rules: If a rule is actually made, the question still remains whether it is proper and sufficient under the circumstances, for due diligence is not satisfied by an insufficient and inadequate rule.¹ "There is an essential difference

Judkins v. Maine Central Ry., 80 Me. 417, 14 At. 735 (1888); Lake Shore, etc., Ry. v. Lavalley, 36 O. St. 221 (1880); Hartvig v. Nor. Pac. L. Co., 19 Or. 522, 25 Pac. 358 (1890); Lewis v. Seifert, 116 Pa. 628, 647, 11 At. 514, 2 Am. St. R. 631 (1887); Madden v. Chesapeake Ry., 28 W. Va. 610, 57 Am. R. 695 (1886); Smith v. Baker (1891), A. C. 325. Kan. 586, 596, 3 Pac. 320 (1884), affirming judgment for \$10,000 in favor of employee; Pool v. Southern Pac. Ry., 20 Utah, 210, 220, 58 Pac. 326 (1899), affirming judgment for \$12,000 in favor of employee's administratrix; Madden v. Ry. Co., 28 W. Va. 610 (1886), sustaining verdict of \$6,000.

⁹⁹ Devoe v. New York, etc., Ry., 174 N. Y. 1, 66 N. E. 568 (1903). Consult also Nolan v. N. Y. Etc. Ry., 70 Conn. 159, 39 At. 115, 43 L. R. A. 305 with full note (1898), and Hill v. Boston & M. Ry., 72 N. H. 578, 57 At. 924 (1904). I. Vose v. Lancashire, etc., Ry., 2 H. & N. 728 (1858); Memphis, etc., Ry. v. Graham, 94 Ala. 545, 10 So. 283 (1891); Dowd v. N. Y. O. & W. Ry., 170 N. Y. 459, 63 N. E. 541 (1902); Willis v. Atlantic, etc., Ry., 122 N. C. 905, 29 S. E. 941 (1898). Nor is the master protected if he

¹⁰⁰ Smith v. Chic., etc., Ry., 91 Wis. 503, 65 N. W. 183 (1895); Ball v. Hauser, 129 Mich. 307, 89 N. W. 49 (1902). sanctions the habitual disregard of the rules by his servants. Hunn v. Mich. Cent. Ry., 78 Mich. 513, 526, 44 N. W. 502, 7 L. R. A. 500 (1889);

^{100a} Hunt & St. J. Ry. v. Fox, 31 McNee v. Coburn, etc., Co., 170 Mass.

between rules made by a master for his own protection and the regulation of his business in his own interest, and those made for the protection of his servants; for, in the one case, the sufficiency affects no one but himself, while in the other, the lives and limbs of his servants are involved. * * * It may be that where the situation is simple and entirely free from complications the sufficiency of the rules made even to protect employees would be a question of law. When, however, the situation is complicated, the question of sufficiency" of the rules, as well as of the manner of their promulgation, "is for the jury. * * * What is reasonable and proper under a complicated state of facts permitting diverse inferences, is a question of fact." Even if the original rules are sufficient, the matter may become liable by permitting them to be habitually violated.^{1a}

182. **For Court or Jury?** It must be confessed, that the diversity of judicial opinion upon the last point in the foregoing extract is irreconcilable. In the case quoted from, a minority of the court dissented, holding² that "the question as to whether a rule is reasonable and proper is a question for the court, and not for the jury." "Of course," said the dissenting judges, "in cases where the facts with reference to the nature and contents of the rule are not clearly established, or are to be determined from controverted facts, the question must be submitted to the jury as to what the rule promulgated was, under proper instructions from the court as to what is necessary to constitute a reasonable and proper rule." The minority view seems to be supported by the weight of authority in other jurisdictions.³ Some courts have declared

283, 49 N. E. 437 (1898); nor if his superintendent orders a violation of it. *Dougherty v. Dobson*, 214 Pa. 252, 63 At. 748, 8 L. R. A. N. S. 90 (1906). *3. Little Rock, etc., Ry. v. Barry*, 84 Fed. 949, 56 U. S. App. 37 (1898), approving and following *Kansas, etc., Ry. v. Dye*, 36 U. S. App. 23, 70 Fed. 24, 16 C. C. A. 604 (1895); *St. Louis, etc., Ry. v. Adcock*, 52 Ark. 406, 12 S. W. 874 (1889); *South Fla. Ry. v. Rhodes*, 25 Fla. 40, 5 So. 633, 23 Am. St. R. 506, 3 L. R. A. 733 (1889); *Reagan v. St. Louis, etc., Ry.*, 93 Mo. 348, 6 S. W. 371, 3 Am. St. R. 542 (1887).

^{1a} *Hampton v. Chicago & Alton Ry.*, 236 Ill. 249, 86 N. E. 90 (1908).
² *Devoe v. N. Y., etc., Ry.*, 174 N. Y. pp. 12, 13. Cf. *McDonnell v. Robinson Co.*, 206 N. Y. 489, 100 N. E. 45 (1912); *Kasack v. N. Y. C. & H. R. Ry.*, 207 N. Y. 246, 100 N. E. 743 (1913).

that the reasonableness of the master's rules is a question for the court, while their sufficiency is for the jury.⁴ Whether rules have been fairly brought to the notice of the servant is generally a question of fact.⁵ The presumption is that necessary rules have been made and duly promulgated.⁶ The burden is on the plaintiff to show that rules would have promoted his security,^{6a} and that defendant's failure to make them was the cause of his harm.^{6b}

183. (3) Duty to Provide a Safe Place to Work. Closely connected with the master's duty, which we have just discussed, is his duty to provide a reasonably safe place for the servant while prosecuting his work. It is not to be understood that a master who carries on an extra-hazardous business is an insurer of his servants' safety. When they enter such employment they assume its necessary risks; but risks which can be obviated by reasonable care on the part of the master are not necessary risks.⁷ A master maintaining electrical wires over which a high voltage of electricity is conveyed, rendering them highly dangerous, is bound to inspect such wires with a care commensurate with the risk, and to use proportionate efforts to keep them properly insulated and to prevent their doing harm to his servants.⁸

At the other extreme, is the master whose business involves no unusual hazard to the servant, such as the ordinary householder or farmer. Here, the duty to provide a safe place to work reaches its lowest limit, extending no farther, probably, than the use of rea-

4. *Chicago, B. & Q. Ry. v. McLallen*, 84 Ill. 109 (1876).

5. *McNee v. Coburn Trolley Co.*, 170 Mass. 283, 49 N. E. 437 (1898).

6. *Hill v. Boston & Maine Ry.*, 72 N. H. 518, 57 At. 924 (1904); *Brady v. Chicago, etc., Ry.*, 114 Fed. 100, 52 C. C. A. 48, 57 L. R. A. 712 (1902).

6a. *McDonnell v. Robinson Co.*, 206 N. Y. 489, 100 N. E. 45 (1912).

6b. *Kasack v. N. Y. C. & H. R. Ry.*, 207 N. Y. 246, 100 N. E. 743 (1913).

7. *Rockport Granite Co. v. Bjornholm*, 115 Fed. 947, 53 C. C. A. 429 (1902).

8. *Myhan v. Louisiana, etc., Co.*, 41 La. Ann. 964, 11 So. 51, 16 L. R.

A. 43, 32 Am. St. R. 348 (1889). In *Union Pac. Ry. v. Jarvi*, 53 Fed. 65,

3 C. C. A. 433 (1892), it is said:

"The care and diligence required of the master is such as a reasonably prudent man would exercise under like circumstances, in order to protect his servants from injury. It must be commensurate with the character of the service required, and with the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case."

sonable care to prevent harm to the servant from unusual danger, which the master knows or ought to know.⁹

In deciding cases which fall between these extremes, the greatest source of difficulty has been, in determining whether the servant's harm was due to the master's fault, in not providing a safe place to work, or to a fellow servant's fault in carrying on the work. The principles to be applied in such cases have been well stated in a recent decision¹⁰ as follows: "It is the master's duty to exercise reasonable care in furnishing those things which go to make up the plant and appliances, so as to have them at the outset reasonably safe for the work of the servants who are engaged in the general employment, and further, to exercise reasonable care, by means of inspections and repairs, when needed, to keep the plant and appliances reasonably safe. These duties the master cannot avoid by employing others for their performance. If the negligence of those who are charged with such performance results in injury to one of those servants for whose safety the precautions are required, the master is liable, unless by reason of the obvious character of the consequent risk, or otherwise, it is assumed by the injured employee, or unless the injury is brought about by contributory negligence."

It will be observed that the master, who has provided a safe plant for his workmen, is not bound absolutely to keep it safe. He is under a legal duty to properly inspect it,¹¹ and, if such inspection disclosed or would have disclosed defects or dangers, to use

9. *Indemauer v. Dames*, L. R. 1 pair; *Potter v. Detroit, etc., Ry.*, 122 C. P. 274, 35 L. J. C. P. 184, L. R. 2 Mich. 179, 81 N. W. 80 (1899), acc. C. P. 311, 36 L. J. C. P. 181 (1867);

Eastland v. Clarke, 165 N. Y. 420, 428, 59 N. E. 202 (1901). In *Collins v. Harrison*, 25 R. I. 489, 56 At. 678, 64 L. R. A. 156 (1903), it is held to be the duty of the employer to furnish the domestic servant with a lodging room in such repair as not to endanger his health.

10. *Smith v. Erie Ry. Co.*, 67 N. J. L. 636, 52 At. 634 (1902). Master held liable to servant for injuries caused by defective roadbed, negligently allowed to remain in bad re-

cord.
11. *Chicago, etc., Ry. v. Kneirin*, 152 Ill. 458, 39 N. E. 324, 43 Am. St. R. 259 (1894); *Simone v. Kirk*, 173 N. Y. 7, 65 N. E. 739 (1902). It is the duty of a master whose servants are excavating materials from a bank of ashes, where lumps, partially undermined, are liable to fall, to so inspect the place as to keep it reasonably safe. Three judges dissented on the ground that the negligence of the foreman related to a matter of detail.

reasonable effort to repair, or remove, or warn against them.¹² But he is not responsible for dangers caused by the intervention of third parties, not to be reasonably anticipated,^{12a} nor for those incurred by a servant who voluntarily leaves a safe place for an unsafe place.^{12b}

184. Safety of Place Dependent upon Co-Servants. At times, the safety of the place where the servants are employed does not depend upon the plant furnished by the employer, but upon the conduct of the employees.¹³ The conditions of the place are constantly changing. "The work and the place of working are coincident."¹⁴ In such cases, if the master has supplied a reasonably safe plant, with appliances for working and repairing it; has made, promulgated and enforced reasonable rules, and has exercised due care in selecting and continuing fellow servants, he has discharged his entire legal duty.^{14a} For the negligence or misconduct of servants in carrying on the work—in executing a detail of operation—the master is not answerable to a fellow servant. That is an ordinary risk of the employment.¹⁵ It must be admitted,

12. *Hanley v. California, etc., Co.*, 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597 (1899). Defective roof of tunnel in which plaintiff was working. *Toledo Brewing, etc., Co. v. Bosch*, 101 Fed. 530, 41 C. C. A. 482 (1899). Defect caused by independent contractor, but reasonable inspection would have disclosed it; *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323, 38 At. 835, 61 N. J. L. 253, 39 At. 764, 39 L. R. A. 834 (1897); *Kelly v. Fourth of July Co.*, 16 Mon. 484, 41 Pac. 273 (1895); *Metzger v. Cramp*, 235 Pa. 17, 83 At. 590 (1912), holding the duty extends to servants of a subcontractor.

12a. *American Bridge Co. v. Seeds*, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. N. S. 1041 (1906).

12b. *Harris v. United Steamship Co.*, 75 N. J. L. 861, 70 At. 155 (1908); *Wilson v. Ches. & O. Ry.*, 130 Ky. 182, 113 S. W. 102 (1908).

13. *Coal Mining Co. v. Clay*, 51 Ohio St. 542, 38 N. E. 610 (1894).

14. *Curley v. Hoff*, 62 N. J. L. 758, 42 At. 731 (1899).

14a. *Henry v. Hudson & M. Ry.*, 201 N. Y. 140, 94 N. E. 623 (1911). If the master knows that the place has become unsafe in the progress of the work, he is bound to restore it to a safe condition.

15. *Callan v. Bull*, 113 Cal. 593, 604, 45 Pac. 1017 (1896). "The making of this bent was a part of the work to be done by the laborers themselves," not a "place furnished by their employer;" *Angel v. Jellico Coal Co.*, 115 Ky. 728, 74 S. W. 714 (1903). "The negligence of fellow servants who placed dynamite before the furnace fire" was held a breach of the master's duty to provide a safe place to work; *Holden v. Fitchburg Ry.*, 129 Mass. 268, 37 Am. R. 348 (1880); *O'Connor v.*

however, that courts are not agreed as to what is a detail of operation, as distinguished from an act which renders the working plant unsafe.¹⁶

185. **Court and Jury.** Nor are they agreed as to whether the question of what constitutes a reasonably safe place to work is one for the court or for the jury. The weight of authority favors the view, that it is not proper to submit to a jury the question whether a particular place of work was reasonably safe. To do that, it is said, would be to substitute the varying opinion of juries, as to how a business should be conducted, for the lawful judgment of the employer, and would prevent the formation of a rule of law upon the subject.¹⁷ "Reasonably safe," it has been judicially declared, "means safe according to the usages, habits and ordinary risks of the business. * * * No jury can be permitted to say that the usual and ordinary way" of preparing a place of work is an unsafe way.¹⁸

In a recent New Hampshire case the majority of the court declared that "when the danger arises, not from the place itself, but from the use of it for the work, and no special skill or experience beyond that involved in doing the work is required to maintain

- Rich, 164 Mass. 560, 42 N. E. 111, 40 29 Sup. Ct. 619 (1909).
 Am. St. R. 486 (1895). A scaffold 16. With cases in the last note, Cf.
 made by servant in prosecuting the Chic., etc., Ry. v. Maroney, 170 Ill.
 work is a detail of operation; Lind- 520, 48 N. E. 953, 62 Am. St. R. 396
 vall v. Woods, 41 Minn. 212, 42 N. (1897); McBeath v. Rawle, 192 Ill.
 W. 1020, 4 L. R. A. 793 (1889); Mc- 626, 61 N. E. 847 (1901), holding
 Laughlin v. Camden Iron Works, 60 that a scaffold used in prosecuting
 N. J. L. 557, 38 At. 677 (1897); the work is a "place to work," not
 Loughlin v. State, 105 N. Y. 159, 11 a detail of operation. The New
 N. E. 371 (1887); Cullen v. Norton, York Labor Law (Chap. 415, L.
 126 N. Y. 1, 26 N. E. 905 (1891); 1897, Consolidated Laws, ch. 31),
 Perry v. Rogers, 157 N. Y. 251, 51 has adopted the Illinois rule, and
 N. E. 1021 (1899); Capasso v. Wool- imposes upon the master the duty
 folk, 163 N. Y. 472, 57 N. E. 760 of providing safe scaffolding for
 (1900); Lambert v. Missisquoi Co., employees; Stewart v. Ferguson,
 72 Vt. 278, 47 At. 1085 (1900); Ok- 164 N. Y. 553, 58 N. E. 662 (1900).
 onski v. Penn., etc., Co., 114 Wis. 17. Bethlehem Iron Co. v. Weiss,
 448, 90 N. W. 429 (1902); Wilson v. 100 Fed. 45, 40 C. C. A. 270 (1900).
 Merry, L. R. 1 Sc. & D. 326, 19 L. 18. Titus v. Bradford, etc., Ry.,
 T. R. 30 (1868); Krelgh v. Westing- 136 Pa. 618, 20 At. 517, 20 Am. St.
 house, C. K. & Co., 214 U. S. 249, R. 944 (1890).

the safety of the place, the maintenance of such safety is the duty of the servant, because it is a part of the work."¹⁹

186. (4) **Duty to Furnish Safe Appliances.** By some courts the term "safe appliances" is used in a very extensive sense, including a safe place in which to work.²⁰ It will be employed in this section to designate machinery, tools and contrivances, which do not form part of the employer's permanent plant, but are used in the business there carried on.

The employer's duty with respect to appliances is substantially the same as his duty with respect to a safe place in which to work. It is not absolute, in the sense that he is an insurer of their perfection.²¹ On the other hand, it is a duty which he cannot assign or delegate so as to free himself from liability for its non-performance.²² The degree of care, which this duty imposes upon the em-

19. *McLaine v. Head & Dowst Co.*, 71 N. H. 294, 52 At. 545, 58 L. R. A. 462, 93 Am. St. R. 522 (1902). The dissenting opinion will repay a careful examination. This declares that "the law now is, that the master by the contract of employment assumes certain personal duties to the servant, not only in respect to original equipment, but subsequent maintenance and management, and that whoever represents him in the discharge of any of these duties, whatever his title or rank, is to that extent the master's agent, for whose negligence the master is responsible to the servant, just as he would be responsible if the negligence were directly his own."

20. *Hess v. Rosenthal*, 160 Ill. 621, 43 N. E. 743 (1896).

21. In *Hough v. Texas, etc., Ry. Co.*, 100 U. S. 213 (1879), it is said: "To guard against the misapplication of these principles, we should say that the corporation is not to be held as guarantying or warranting the absolute safety, under all circumstances, or the perfection in

all its parts, of the machinery or apparatus which may be provided for the use of employees. Its duty in that respect to its employees is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care, as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees." The general rule is that a master is not liable for a mere error of judgment in selecting appliances. Negligence, or culpable ignorance, must be shown. *O'Neill v. Chic., etc., Ry.*, 62 Neb. 358, 86 N. W. 1098, 60 L. R. A. 443 (1901), and cases cited therein. In *Southern Ry. v. Lewis*, 110 Va. 847, 67 S. E. 357 (1910), it is said: "The unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business."

22. In *Balt. & Ohio Ry. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914 (1893), the court said: "That positive duty does not go to the extent of a

ployer, varies with the character of the appliances. Some kinds are much more dangerous than others, and require greater skill in selecting and installing, as well as greater watchfulness of their condition. If the master exercises such care and skill in furnishing appliances, and in inspecting and repairing them,²³ he has performed his whole duty in this respect towards his servants; and for any injury sustained by one servant, through the negligent use or care of such appliances by a fellow servant, the master is not answerable.²⁴ In some jurisdictions, however, the master's duty seems to extend to securing the proper use of safe appliances,²⁵ but this view does not appear to accord either with sound principle or the weight of authority.²⁶

187. Safety of Appliances and Fellow Servants. When the master does not personally superintend and direct the selection, repair and custody of appliances, the extent of his liability for in-

guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects." *Noble v. Bessemer Co.*, 127 Mich. 103, 86 N. W. 520, 89 Am. St. R. 461 (1901); *Orr v. So. Tel. Co.*, 132 N. C. 691, 44 S. E. 401 (1903); *Port Makely Mill Co. v. Garrett*, 97 Fed. 537 (1899); *Ry. Co. v. Peterson*, 162 U. S. 353, 16 Sup. Ct. 842 (1896), accord.

^{23.} *Byrne v. Eastmans Co.*, 163 N. Y. 461, 57 N. E. 738 (1900); *Kelly v. N. H. Steamboat Co.*, 74 Conn.

343, 50 At. 871, 92 Am. St. R. 220 (1902).

^{24.} *Trimble v. Whitin Mach. Wks.*, 172 Mass. 150, 51 N. E. 463 (1898), master furnished a suitable gang-plank which was improperly placed by a fellow servant; following *Robinson v. Blake Mfg. Co.*, 143 Mass. 528, 10 N. E. 314 (1887); *Ashley v. Hart*, 147 Mass. 573, 18 N. E. 416 (1888); *Thyng v. Fitchburg Ry.*, 156 Mass. 13, 30 N. E. 169 (1892); *Carroll v. W. U. T. Co.*, 160 Mass. 152, 35 N. E. 456 (1893); *Allen v. Smith Iron Co.*, 160 Mass. 557, 36 N. E. 581 (1893); *Anderson v. Erie Co.*, 68 N. J. L. 647, 54 At. 830 (1903); car of another railroad, whose defects were not discoverable by ordinary inspection.

^{25.} *John S. Metcalf Co. v. Nystedt*, 203 Ill. 333, 67 N. E. 764 (1903).

^{26.} *Jennings v. Iron Bay Co.*, 47 Minn. 111, 49 N. W. 685 (1891); *Steamship Co. v. Ingebregsten*, 57 N. J. L. 400, 31 At. 619 (1895).

juries due to their defects, unfitness or dangerous condition, is a matter upon which the courts are not agreed. In England, the master appears to discharge his full duty towards servants, in such cases, when he uses due care in selecting proper representatives to act in his stead, and supplies them with adequate materials and resources.²⁷ Such is not the doctrine in any of our jurisdictions. Almost without exception, our courts declare that a master cannot escape liability for injuries to a servant by unsafe appliances, by showing that he delegated their selection to a thoroughly competent and experienced agent. The duty of selecting them with reasonable care—a care proportionate to their dangerous character—cannot be shifted to a delegate. It remains upon the master, no matter who is employed by him to perform it.²⁸ To be sure, the agent is under no greater duty of care than his employer. He is not bound to select the very best appliances discoverable. It is enough that he selects such as are in ordinary use, and are reasonably safe.²⁹ But if he fails to do this, his negligence is that of his employer.³⁰

27. *Wilson v. Merry*, L. R. 1 Sc. & D. 326, 19 L. T. R. 30 (1868). This seems to be the rule in Maryland. *Nat. Enam. Co. v. Cornell*, 95 Md. 524, 52 At. 588 (1902). But see *Young Company v. State, Use of Kabot*, 117 Md. 247, 83 At. 345 (1912).

28. In addition to cases cited in previous notes, see *Nor. Pac. Ry. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590 (1885); *Cincinnati, etc., Ry. v. McMullen*, 117 Ind. 439, 29 N. E. 287, 10 Am. St. R. 67 (1888); *Toy v. U. S. Cartridge Co.*, 159 Mass. 313, 34 N. E. 461 (1893); *Morton v. Detroit Ry. Co.*, 81 Mich. 423, 46 N. W. 111 (1890); *Bailey v. R. W. & O. Ry.*, 139 N. Y. 302, 34 N. E. 918 (1893); *Ell v. Nor. Pac. Ry.*, 1 N. Dak. 336, 26 Am. St. R. 621 with note, 48 N. W. 222 (1891); *Gunter v. Graniteville Co.*, 18 S. C. 262 (1882); *Baltimore & O. Ry. v. Wilson*, 117 Mo. 198, 83 At. 248 (1912); *Frizzell v. Sullivan*, 117 Md. 388, 83 At. 651 (1912); *Union Pac. Ry. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756 (1894), affirming s. c. 6 Utah, 357, 23 Pac. 762, upholding employee's verdict for \$10,000; *Port Blakely Mill Co. v. Garrett*, 97 Fed. 537 (1899), affirming judgment for \$5,000; *Fuller v. Jewett*, 80 N. Y. 46 (1880).

29. *Louisville, etc., Ry. v. Hall*, 91 Ala. 112, 8 So. 371, 24 Am. St. R. 863 (1891); *Little Rock, etc., Ry. v. Eubanks*, 48 Ark. 460, 3 S. W. 808, 3 Am. St. R. 245 (1886); *Gurneau, etc., Co. v. Palmer*, 28 Neb. 207 (1889); *Bohn v. Chicago, etc., Ry.*, 106 Mo. 429, 17 S. W. 580 (1891); *Carlson v. Phoenix, etc., Co.*, 132 N. Y. 273, 30 N. E. 750 (1892); *Nix v. Tex. Pac. Ry.*, 82 Tex. 473, 18 S. W. 571, 27 Am. St. R. 897 (1891); *Humphreys v. Newport, etc., Ry.*, 33 W. Va. 135, 10 S. E. 39 (1889); *Keeler v. Schwenk*, 144 Pa. 348, 22 At. 910, 27 Am. St.

188. Keeping Appliances Safe. After the master has selected and installed reasonably safe appliances, what is his duty with respect to keeping them safe? ³¹ It must be confessed that the judicial answers are not harmonious. In a recent case,³² after allusion to the "incongruous decisions" upon this topic, the court suggested, that "a rational distinction would seem to be that, when the employee's duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment, then he is not intrusted with the master's duty to his fellow servant, and the master is not responsible to his fellow servant for his fault, but that, if the master has cast a duty of inspection or repair upon an employee, who is not engaged in using the apparatus in a common employment with his fellow servant, then that employee, in that duty, represents the master, and the master is chargeable with his default." Although this distinction has been recognized and followed in other jurisdictions,³³ it has not found acceptance in all.³⁴ And even the courts which have adopted the distinction do not seem to apply it consistently. The inspection of cars which the servants of a railroad company are to handle, is a task allotted to employees who are not engaged in using them. For their negli-

R. 633 (1891); *Harper v. Illinois Cent. Ry.*, 131 Ky. 225, 115 S. W. 198 (1909); *Wita v. Interstate Iron Co.*, 103 Minn. 303, 115 N. W. 169, 16 L. R. A. N. S. 128 (1908).

30. *Myers v. Hudson Iron Co.*, 150 Mass. 125, 29 N. E. 631, 15 Am. St. R. 176 (1889); *Johnson v. Spear*, 76 Mich. 139, 42 N. W. 1092, 15 Am. St. R. 298 (1889); *Carter v. Oliver Oil Co.*, 34 S. C. 211, 13 S. E. 419, 27 Am. St. R. 815 (1891); *Galveston, etc., Ry. v. Garrett*, 73 Tex. 262, 13 S. W. 62, 15 Am. St. R. 781 (1889); *National Refining Co. v. Willis*, 152 Fed. 107, 81 C. C. A. 325 (1905).

31. *Trigg W. R. Co. v. Lindsay*, 101 Va. 193, 43 S. E. 349 (1903). "Though a master is liable for failure to use ordinary care to provide reasonably safe machinery, he is not liable for unsafe conditions ex-

isting while the machinery is in process of erection; and where an emery wheel exploded because of the improper arrangement of the pulleys, resulting from the fault of a fellow servant of plaintiff, who was injured thereby before the machine was ready for operation, the master was not liable."

32. *Steamship Co. v. Ingebregsten*, 57 N. J. L. 400, 31 At. 619 (1895).

33. *Moynihan v. Hills Co.*, 146 Mass. 586, 16 N. E. 574 (1888); *Drum v. New England Co.*, 180 Mass. 113, 61 N. E. 812 (1901); *Cregan v. Marston*, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. R. 851 (1891).

34. *Buck v. New Jersey Zinc Co.*, 204 Pa. 132, 53 At. 740, 60 L. R. A. 453 (1902); *Wachsumth v. Shaw Co.*, 118 Mich. 275, 76 N. W. 497 (1898).

gent inspection, the master should be held liable;³⁵ but in Alabama, Massachusetts and Michigan, such inspectors are deemed fellow servants of those managing the cars, for the faithful performance of whose duty the employer is not liable.³⁶

189. (5) **Duty to Warn of Danger.** Still a fifth duty, which the law imposes upon the master towards his servant, is that of warning him of danger in certain circumstances. It does not rest upon every master, nor does it exist in favor of every servant. If the danger is one of which the master, without negligence, is ignorant, there can be no obligation on his part to disclose it.³⁷ A servant who knows and appreciates the danger attending his master's business is not entitled to be warned of its existence.³⁸ The law does not command impossibilities nor stipulate for superfluities.

In cases, however, where the master knows, or, had he used due care, would have discovered, that the employment is dangerous, and has reason to believe that his servant does not know the danger and will not discover it in time to protect himself from injury, he is under a legal duty to give proper warning³⁹ and instructions

35. *Baltimore & P. Ry. v. Mackay*, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624 (1895); *Burns v. Pethcal*, 75 Hun (N. Y.) 437 (1894): "The master must warn his servants of all dangers to which they will be exposed in his employment, * * * except such as he cannot be deemed to have foreseen." *Wagner v. Jayne Chem. Co.*, 147 Pa. 475, 479, 23 At. 772, 30 Am. St. R. 745 (1892); *Gay v. So. Ry.*, 101 Va. 466, 44 S. E. 707 (1903).

36. *Smoot v. Mobile, etc., Ry.*, 67 Ala. 13 (1880); *Mackin v. B. & A. Ry.*, 135 Mass. 201, 46 Am. R. 201 (1883); *Lellis v. Mich. Cent. Ry.*, 124 Mich. 37, 82 N. W. 828 (1900); *Dewey v. Detroit, etc., Ry.*, 97 Mich. 334, 52 N. W. 942, 22 L. R. A. 294, 37 Am. St. R. 348 (1893).

37. *Walkowski v. Penokee, etc., Mines*, 115 Mich. 629, 73 N. W. 895, 41 L. R. A. 33, with note (1898);

38. *Rooney v. Sewall, etc., Co.*, 161 Mass. 153, 36 N. E. 789 (1894); *Yeager v. Burlington, etc., Ry.*, 93 Ia. 1, 61 N. W. 215 (1894); *Reynolds v. Boston, etc., Ry.*, 64 Vt. 66, 24 At. 134, 33 Am. St. R. 908 (1891).

39. *Baxter v. Roberts*, 44 Cal. 187, 13 Am. R. 160 (1872); *Holshouser v. Denver Gas Co.*, 18 Col. App. 431, 72 Pac. 289 (1903). Danger of being shot by neighbors or strikers.

to the servant.⁴⁰ The warning should be unequivocal,⁴¹ and the instructions should be such as are suited to the circumstances of the particular case.⁴² If the servant is young and inexperienced, the instructions should be more minute than in case of an adult, and especial care should be taken to make them intelligible.⁴³ Still, even toward minors, the master is "only required to do what a prudent master would naturally do under like circumstances."⁴⁴

190. Court and Jury. Whether the warning and instructions in a particular case are those which a prudent master would naturally give, is generally a question for the jury;⁴⁵ although, if the evidence is undisputed, and fairly warrants but one inference, it

Engelking v. City of Spokane, 59 Wash. 446, 110 Pac. 25, 1 Neg. & Comps. Cas. Ann. 142, 29 L. R. A. N. S. 481 (1910).

40. **Ingerman v. Moore**, 90 Cal. 410, 27 Pac. 306, 25 Am. St. R. 138 (1891); **Tedford v. Los Angeles Tel. Co.**, 134 Cal. 76, 66 Pac. 76 (1901), sustaining verdict for \$15,000; **Daly v. Kiel**, 106 La. 170, 30 So. 254 (1901), affirming judgment for \$1,500; **Bjbjian v. Woonsocket R. Co.**, 164 Mass. 214, 41 N. E. 265 (1895); **Brennan v. Gordon**, 118 N. Y. 489, 23 N. E. 810 (1890); **Kielley v. Belcher Silver Min. Co.**, 3 Sawy. (U. S.) 437 (1875); **The Pioneer**, 78 Fed. 600 (1897), sustaining a verdict for \$5,000; **Stuart v. West End Ry.**, 163 Mass. 391, 393, 40 N. E. 180 (1895).

41. **Myhan v. La. Elec. Co.**, 41 La. Ann. 964, 6 So. 799, 7 L. R. A. 172, 17 Am. St. R. 436 (1889).

42. **Tagg v. McGeorge**, 155 Pa. 268, 26 At. 671, 35 Am. St. R. 889 (1893). "It is the duty of the employer to give suitable instructions as to the manner of using dangerous machines." **Davis v. Augusta Factory**, 92 Ga. 712, 18 S. E. 974 (1893): "Much depends upon the

nature of the machinery, the age, capacity, intelligence and experience of the employee, as well as all the surrounding circumstances and facts." **Davis Coal Co. v. Poland**, 158 Ind. 607, 62 N. E. 492, 92 Am. St. R. 319 (1901).

43. **O'Connor v. Golden Gate Co.**, 135 Cal. 537, 67 Pac. 966, 87 Am. St. R. 127 (1902); **Newburg v. Getchel, etc., Co.**, 100 Ia. 441, 69 N. W. 743, 62 Am. St. R. 582 (1896); **Chicago, etc., Co. v. Reinneiger**, 140 Ill. 334, 29 N. E. 1106, 33 Am. St. R. 249 (1892); **Brazil Block Co. v. Young**, 117 Ind. 520, 20 N. E. 423, 12 Am. St. R. 422 (1889); **James v. Rapides Lumber Co.**, 50 La. Ann. 717, 23 So. 469, 44 L. R. A. 33, with full note (1898); **Bohn Mfg. Co. v. Erickson**, 55 Fed. 943, 12 U. S. App. 260, 5 C. C. A. 341 (1893); **Bare v. Crane Creek Coal, etc., Co.**, 61 W. Va. 28, 55 S. E. 907, 8 L. R. A. N. S. 284 (1906).

44. **Omaha Bottling Co. v. Theiler**, 59 Neb. 257, 80 N. W. 821, 80 Am. St. R. 673 (1899).

45. **Hartrich v. Hawes**, 202 Ill. 334, 67 N. E. 13 (1903); **James v. Rapides Lumber Co.**, 50 La. Ann. 717, 23 So. 469, 44 L. R. A. 33, with

will be disposed of by the court.⁴⁶ And wherever it clearly appears that the servant was fully aware of the dangers of his employment, and fully informed as to his proper course of conduct, the master, as we have seen, is under no duty to give warning or instruction. The servant takes the risk of the situation.⁴⁷

Moreover, even when the master has violated his duty of warning and instructing the servant, the latter has no right of action, unless such violation was the proximate cause of his injury.⁴⁸

191. Assumption of Risk and Contributory Negligence of Servant. The master who has performed the various duties enumerated above, is not chargeable at common law⁴⁹ for the injuries sustained by a servant in his employment. They are to be ascribed to the risks of the business, which the servant impliedly engages to assume, or to his contributory negligence. Either is a perfect defense for the master at common law, when sued by the servant, but they ought not to be confused.

Assumption of risk is an affirmative defense which must be pleaded⁵⁰ and proved⁵¹ by the defendant. Moreover, it rests, at

note (1898); *De Costa v. Hargraves* Minn. 79, 69 N. W. 630 (1896); *Mills*, 170 Mass. 375, 49 N. E. 735 (1898); *Addicks v. Cristoph*, 62 N. J. L. 786, 43 At. 196, 72 Am. St. R. 687 (1899); *Dresser Employer's Liability*, p. 470.

46. *Carrigan v. Washburn, etc., Co.*, 170 Mass. 79, 48 N. E. 1079 (1898); *Juchatz v. Michigan Alkali Co.*, 120 Mich. 645, 79 N. W. 90 (1899).

47. *Staldter v. City of Huntington*, 153 Ind. 354, 55 N. E. 88 (1899); *McClusky v. Garfield Co.*, 180 Mass. 115, 61 N. E. 804 (1901); *Roberts v. Missouri Tel. Co.*, 166 Mo. 370, 66 S. W. 155 (1901); *Maltbie v. Belden*, 167 N. Y. 307, 60 N. E. 645, 54 L. R. A. 52 (1901); *Drake v. Auburn City Ry.*, 173 N. Y. 466, 66 N. E. 121 (1903); *Erdman v. Ill. Steel Co.*, 95 Wis. 6, 69 N. W. 993, 60 Am. St. R. 66 (1897); *Anderson v. C. N. Nelson Lumber Co.*, 67

Minn. 79, 69 N. W. 630 (1896); *Lally v. Crockston Lumber Co.*, 82 Minn. 407, 85 N. W. 187 (1901).

48. *Henderson v. Williams*, 66 N. H. 405, 23 At. 365 (1891); *Buckley v. Gutta Percha Co.*, 113 N. Y. 540, 21 N. E. 717 (1889); same principle *Morrison v. Whittier Mach. Co.*, 184 Mass. 39, 67 N. E. 646 (1903).

49. The most important statutory changes upon this topic will be noted hereafter.

50. *Oregon, etc., Ry. v. Tracy*, 66 Fed. 931, 14 C. C. A. 199 (1895); *Nicholaus v. Chicago, etc., Ry.*, 90 Ia. 85, 57 N. W. 694 (1894); *Faulkner v. Mammoth Min. Co.*, 23 Utah, 437, 66 Pac. 799 (1901): "As assumed risk is an affirmative defense, essentially different in its character from the defense of contributory negligence, it should therefore be treated as an implied contract in bar and as a waiver

times, upon a valid contract of the plaintiff, while contributory negligence is a question of plaintiff's conduct in particular circumstances. The distinctions have been stated very satisfactorily in a recent Indiana decision.⁵² The plaintiff sued his employer, a coal mining company, for damages sustained by the falling of slate from the roof of the mine. Defendant claimed that plaintiff had not only assumed the risk of employment in the mine in question, but was also guilty of contributory negligence. Referring to the arguments in defendant's behalf, the court said: "Counsel are confusing the doctrines of contributory negligence and assumption of risk. Assumption of risk is a matter of contract. Contributory negligence is a question of conduct. If appellee were to be defeated by the rule of assumed risk, it would be because he agreed, long before the accident happened, that he would assume the very risk from which his injury arose."^{52a} If appellee were to be defeated by the rule of contributory negligence, it would be because his conduct, at the time of the accident, under all the attendant circumstances, fell short of ordinary care. If the one circumstance of the employee's knowledge of the employer's failure to provide the statutory safeguards were held, as a matter of law, always to overcome the other circumstances characterizing the employee's conduct at the time of the accident, assumption of risk would be successfully masquerading in the guise of contributory negligence. If the assumption of risk is the issue, knowledge of defective conditions and acquiescence therein are fatal. If contributory negligence is the issue, knowledge of defective conditions and acquiescence therein may be fatal, or may not be, depending upon whether a person of ordinary prudence, under all the circumstances, would

of the plaintiff's right to recover." Cf. *Miller v. Detroit, etc., Ry.*, 133 Mich. 564, 95 N. W. 718 (1903); and *De Cair v. Mainstee Ry.*, 133 Mich. 578, 95 N. W. 726 (1903).

51. *Dowd v. N. Y., etc., Ry.*, 170 N. Y. 459, 63 N. E. 541 (1902). "We think that the burden of showing that the servant assumed the risk of obvious dangers rests upon the master." *Welle v. Celluloid Co.*, 175 N. Y. 401, 67 N. E. 609 (1903).

52. *Davis Coal Co. v. Poland*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. R. 319 (1901). It was held in this case, that the risks, arising from an employer's disregard of specific statutory requirements for the safety of employees, cannot be assumed by the servant. See *supra*, ¶ 89.

52a. *Burns v. Del. & At. Tel. Co.*, 70 N. J. L. 745, 59 At. 220 (1904), no assumption of risk in this case.

have done what the injured person did.^{52b} If the risk is so great and immediately threatening that a person of ordinary prudence, under all the circumstances, would not take it, contributory negligence is established. If the risk is not so great and immediately threatening but that a person of ordinary prudence, under all the circumstances, would take it, contributory negligence is not established.”⁵³

In a number of jurisdictions the defense of assumption of risk has been abolished by statute. Under such legislation, it becomes very important to distinguish between assumption of risk and contributory negligence.^{53a}

^{52b}. *Jackson v. Greene*, 201 N. Y. 76, 92 N. E. 1107 (1911).

⁵³. Similar views are maintained in the following cases: *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33, with extensive note (1900); *O'Maley v. So. Boston Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161 with note (1893); *Fitzgerald v. Conn. Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. R. 537 (1891); *Meunier v. Chemical Co.*, 180 Mass. 109, 61 N. E. 810 (1901), plaintiff held guilty of contributory negligence upon his own evidence; *St. Louis, etc., Ry. v. Irwin*, 37 Ks. 701, 16 Pac. 146, 1 Am. St. R. 266 (1887); *Atchinson, etc., Ry. v. Bancord*, 66 Ks. 81, 71 Pac. 253 (1903); *Alcorn v. Chic., etc., Ry.*, 108 Mo. 81, 18 S. W. 188 (1891); *Dowd v. N. Y., etc., Ry.*, 170 N. Y. 459, 63 N. E. 541 (1902); *Texas, etc., Ry. v. Conroy*, 83 Tex. 214, 18 S. W. 609; *Faulkner v. Mammoth Min. Co.*, 23 Utah, 437, 66 Pac. 799 (1901); *Miner v. Franklin Co. Tel. Co.*, 83 Vt. 311, 75 At. 653, 25 L. R. A. N. S. 653 (1910); *Tuttle v. Detroit, etc., Ry.*, 122 U. S. 189, 7 Sup. Ct. 1116, 30 L. Ed. 1114 (1887), assumption of risk; *South-*

ern Pac. Ry. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391 (1894), both assumption of risk and contributory negligence involved.

^{53a}. *Schlemmer v. Buffalo, etc., Ry.*, 220 U. S. 590, 31 Sup. Ct. 561 (1911): “In the present case, the statute of Congress expressly provides that the employee shall not be deemed to have assumed the risk of injury if such is occasioned by his continuing in the employ of the carrier after the unlawful use of the car or train in the failure to provide automatic couplers has been brought to his knowledge. Therefore, when Schlemmer saw that the shovel-car was not equipped with an automatic coupler he would not from that knowledge alone, take upon himself the risk of injury without liability from his employer.

But there is nothing in the statute absolving the employee from the duty of using ordinary care to protect himself from injury in the use of the car with the appliances actually furnished. In other words, notwithstanding the company failed to comply with the statute, the employee was not for that reason absolved from the duty of using ordi-

192. Servant Remaining after Knowledge of Danger. When a servant is fully aware that his master has violated any of his duties towards him, and appreciates, or should appreciate, the attendant risks, he is entitled to leave the employment. If he voluntarily remains and continues in the hazardous work, he assumes the risk, or may even be guilty of contributory negligence,⁵⁴ as we have seen. Nor will it avail him, that he continued in the hazardous position through fear of being dismissed if he protested against his master's negligence. But a different situation exists, when he is induced to go on by the master's promise to remove the danger. In such a case, "the risk during the running of the promise and for a reasonable time thereafter is that of the master and not of the servant,"⁵⁵ according to the weight of authority in this country.⁵⁶

nary care for his own protection under the circumstances as they existed. This has been the holding of the courts in construing statutes enacted to promote the safety of employees. *Krause v. Morgan*, 53 Ohio St. 26; *Holum v. Railway Co.*, 80 Wis. 299; *Grand v. Railway Co.*, 83 Mich. 564; *Taylor v. Manufacturing Co.*, 143 Mass. 470. And such was the holding of the Court of Appeals of the Eighth Circuit, where the statute now under consideration was before the court. *Denver & Rio Grande R. R. Co. v. Arrighi*, 129 Fed. Rep. 347." The court reached the conclusion that the deceased was guilty of contributory negligence. Compare the above extract with the opinion of Holmes, J., in the same case, in 205 U. S. 1, 27 Sup. Ct. 407 (1907); *Pulk v. Churchill*, 146 Wis. 477, 131 N. W. 906 (1911), applying Wis. R. S. sec. 1636jj, L. 1905, ch. 303. The present Federal Employers' Liability Act abolishes the defense of contributory negligence in certain cases. Ch. 149, § 3 of L. 1908.

54. In some jurisdictions, as we have seen (*supra*, ¶ 89), when the negligence of the master consists in the violation of a statutory duty of care, there can be no contributory negligence by the servant, "because the continuing negligence of the defendant up to the moment of the injury is subsequent to the plaintiff's negligence, if any, and is the proximate cause of the injury." *Troxler v. Southern Ry.*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. R. 580 (1899). See *Texas & P. Ry. v. Howell*, 224 U. S. 577, 32 Sup. Ct. 601 (1912).

55. *Rice v. Eureka Paper Co.*, 174 N. Y. 385, 66 N. E. 979 (1903); *Dowd v. Erie Ry.*, 70 N. J. L. 451, 57 At. 248 (1904).

56. *Hough v. Texas, etc., Ry.*, 100 U. S. 213, 225, 25 L. Ed. 612 (1879); *Birmingham Ry. v. Allen*, 99 Al. 359, 13 So. 8, 12, 20 L. R. A. 457 (1892); *Standard Oil Co. v. Helmick*, 148 Ind. 460, 47 N. E. 14 (1897), servant was induced by the promise, as defect was not to be remedied until after the injury hap-

193. The Risk from Fellow-Servant's Misconduct. This is one of the most important risks which a servant assumes. The general rule applicable to it may be stated briefly in these terms: "One who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment."^{56a} The earliest case in which the existence of this rule was suggested, is that of *Priestly v. Fowler*,⁵⁷ although "all the case actually decided was that a master does not warrant to his servant the sufficiency and safety of a carriage in which he sends him out."⁵⁸ A few years later, it was formally announced by a divided court in South Carolina,⁵⁹ and, a year thereafter, received a statement and exposition by Chief Justice Shaw, which have become classical.⁶⁰ In each of the cases named above, stress was laid upon the fact, that no precedent could be

pened; *Swift v. O'Neill*, 187 Ill. 337, 58 N. E. 416 (1900); *Illinois Steel Co. v. Mann*, 170 Ill. 200, 48 N. E. 417, 62 Am. St. R. 370, 40 L. R. A. 781 (1897); *Cleveland, C. C. & St. L. Ry. v. Powers*, 173 Ind. 105, 88 N. E. 1073 (1909); *Stoutenburgh v. Dow, Gilman, etc., Co.*, 82 Ia. 179, 47 N. W. 1039 (1891); *Brown v. Levy*, 108 Ky. 163, 55 S. W. 1079 (1900); *Roux v. Blodgett, etc., Co.*, 85 Mich. 519, 48 N. W. 1092, 24 Am. St. R. 102, 13 L. R. A. 728 (1891); *Snowberg v. Nelson-Spencer Co.*, 43 Minn. 532, 45 N. W. 1131 (1890); *Conroy v. Vulcan Iron Works*, 62 Mo. 35 (1876); *Manufacturing Co. v. Morrissey*, 40 Oh. St. 148, 48 Am. R. 669 (1883); *Patterson v. Pittsburgh etc., Ry.*, 76 Pa. 389, 18 Am. R. 412 (1874); *Gulf, etc., Ry. v. Donnelly*, 70 Tex. 371, 8 S. W. 52, 8 Am. St. R. 608 (1888); *Dresser, Employers' Liability*, § 115.

^{56a.} *Randall v. Bal. & O. Ry.*, 109 U. S. 478, 483, 3 Sup. Ct. 322 (1883).

^{57.} 3 M. & W. 1, 49 R. R. 495 (1837).

^{58.} *Pollock on Torts* (6 Ed.) p. 95 note.

^{59.} *Murray v. South Car. Ry.*, 1 McMullan Law, 385, 36 Am. Dec. 268 (1841); *Evans, J.*, said: "If this plaintiff is entitled to recover, a new class of liabilities would arise, which I do not think has ever heretofore been supposed to exist. It is admitted no case like the present has been found, nor is there any precedent suited to the plaintiff's case. * * * With the plaintiff, the defendants contracted to pay for his services. Is it incident to this contract that the company should guarantee him against the negligence of his co-servant? It is admitted he takes upon himself the ordinary risks of his vocation; why not the extraordinary ones? Neither are within his contract."

^{60.} *Farwell v. Boston, etc., Ry.*, 4 Met. (Mass.) 49, 38 Am. Dec. 389 (1842). For a more detailed discussion of these and other early decisions on this topic see an article entitled "Is Law the Expression of Class Selfishness?" 25 *Harvard Law Rev.* 349 (1912).

found for an action, by a servant against his master, for injuries due to the misconduct of a fellow-servant.

194. From this admitted lack of precedent, different conclusions have been drawn. It has been inferred, on the one hand, that these decisions "ingrafted into English law a new rule."⁶¹ On the other hand, the inference has been drawn that the law had always been in accordance with these decisions, and that not until these actions were brought had an attempt been made to hold the master liable to a servant for harm due to a co-servant.⁶² Whichever inference may be the correct one, the rule established by these cases was accepted with a unanimity quite unusual, and has been enforced in a manner which shows that not only the legal profession, but the community at large, agree with Chief Justice Shaw in the conviction, that the rule results "from considerations as well of justice as of policy." The statutory modifications, whether in Eng-

61. See note on this topic in 75 *Am. St. R.* 584 et seq. This seems to be Sir Frederick Pollock's view. "Our law," he writes "can show no more curious instance of a rapid modern development. The first evidence of any such rule is in *Priestly v. Fowler*, decided in 1837. * * * It was not only adopted by the House of Lords for England, but forced by them on the reluctant courts of Scotland to make the jurisprudence of the two countries uniform." *Torts* (6 Ed.), pp. 95, 97. Referring to the rule, in another connection he writes: "Its history is certainly not a favorable one. It appears to be rejected by continental jurisprudence, and recent legislation in Germany has deliberately increased employers' liabilities in the case of railways and other specified industries. In England and the United States, it is modern." *Essays in Jurisprudence*, pp. 114, 115. It does not exist in Mexico, *Mexican Cent. Ry. v. Sprague*, 114 Fed. 544, 52 C. C. A. 318 (1902).

62. Pollock, C. B., in *Vose v. Lancashire, etc., Ry.*, 2 H. & N. 728, 734 (1858), said: "The law must have been the same long before it was enunciated in *Priestly v. Fowler*. If not, such actions would have been of frequent occurrence. No such action appears to have been brought before that case. We ought not to allow so important a decision to be frittered away by minute distinctions or the ingenuity of advocates." Similar views are expressed by Judge Dillon, in 24 *Am. L. Rev.* 180. In *Bartonshill Coal Co. v. McGuire*, 3 Macq. 310 (1858). Lord Chancellor Chelmsford said: "The decisions upon the subject in both countries are of recent date, but the law cannot be considered to be so; the principles upon which these decisions depend must have been lying deep in each system, ready to be applied when the occasion called them forth."

land or in this country, do not evince a disposition to abolish the rule although they show dissatisfaction with some of its consequences.^{62a}

195. Reasons for the Rule. In the *Farwell* case, plaintiff's counsel based his claim on the ground of contract—an implied contract of indemnity arising out of the relation of master and servant. The existence of such a contract was repudiated by the court, which declared that “the rule resulting from considerations as well of justice as of policy is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except those perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others.”

196. Not a True Contract Provision. This form of statement that the master's exemption from liability in these cases rests upon the implied contract between servant and master, has been adopted by most courts.⁶³ It is open to criticism,⁶⁴ perhaps, unless we bear

62a. Since the publication of the earlier editions of this work, legislators have evinced a decided disposition to abolish this rule, in the case of railroad corporations and other large industrial employers. See §§ 211, 212 on Workmen's Compensation Acts and other topics.

63. In *Hutchinson v. York, etc., Ry.*, 5 Exch. 343, 19 L. J. Exch. 296 (1850), it is said: “The principle is that a servant when he engages to serve a master undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of negligence upon the part of a fellow-servant, when he is acting in the discharge of his duty as servant of him who is the common master of both.” In *Morgan v. Vale of Neath Ry.*, 5 B. & S. 570, 578, 33 L. J. Q. B. 260 (1866), Lord Blackburn used this language: “A servant who engages for the performance of services for compensation does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services: the presumption of law being that the com-

in mind that the contract here referred to is not a true consensual agreement, but an obligation imposed by law. That this is the sense in which Chief Justice Shaw employed the term is apparent from the following extract: "In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances."

If a true contract were necessary to exempt the master, he would be liable to one who voluntarily "associates himself with a master's servants in the performance of his work;" but he is not so liable.⁶⁵ Moreover, if the exemption of the master rested upon an actual stipulation in the contract of hiring, a servant who hired to a master, in a jurisdiction where the fellow-servants rule ex-

pensation was adjusted accordingly, or in other words, that these risks are considered in the wages." In *Boswell v. Barnhoot*, 96 Ga. 521, 23 S. E. 414 (1895), the court said: "The ground upon which a master is relieved from liability to a servant for injuries resulting from negligence of a fellow-servant is that the servant, when he enters the employment of the master, impliedly contracts to assume the risk of negligence, as one of the risks incident to the service, and that his compensation is fixed with reference to this; and, clearly, this reason cannot apply in the case of one not voluntarily in the service, but merely a prisoner, serving out his sentence for a violation of the law. Indeed, it can hardly be seriously contended that a chain-gang boss is in any sense a fellow-servant of a prisoner working under him. The boss, while acting in that capacity, is the alter ego of his employer, and the latter is responsible for any wrongful or negligent acts on the part of such employee by which a prisoner is deprived of his life."

64. In 24 Am. L. Rev., p. 180, Judge Dillon, after quoting the language of Chief Justice Shaw, adds: "A modern jurist would probably prefer to say that the relation was one wherein the duties and liabilities of the parties were fixed by law."

65. *Potter v. Faulkner*, 1 B. & S. 800, 31 L. J. Q. B. 30 (1861); *Swainson v. North E. Ry.*, 3 Exch. Div. 341, 47 L. J. Exch. 372 (1877); *Stevens v. Chamberlain*, 100 Fed. 384, 40 C. C. A. 421, 51 L. R. A. 513 (1900); *Osborne v. Knox, etc., Ry.*, 68 Me. 49 (1877); *Barstow v. Old Col. Ry.*, 143 Mass. 535 (1887).

isted, would be barred from recovery, although he was injured in a jurisdiction where the rule did not obtain; but he is not so barred.⁶⁶

197. Who Are Fellow-Servants? Various Tests. While the rule of exemption, which we have been considering, seems a simple one, the courts have experienced no little difficulty in discovering the true test of fellow-service, within the meaning of this rule, as well as in determining the proper limits of the rule itself.

“Speaking generally,” to quote from a recent decision, “two rules, applied as tests in questions of this kind, have obtained a wide acceptance. Under one, the test is whether the duty violated by the offending servant was one resting upon the master, or solely upon the offending servant; while under the other, the test is whether the offending servant, in what he did or omitted to do, was or was not *pro hac vice* the master. Under the first rule, the test is mainly the nature and character of the duty violated by the offending servant. If it was a duty resting upon the master, he is liable to the injured servant for the negligence of the offending servant; if it was not such a duty, he is not. Under this rule, the rank or grade of the offending servant in the master’s business or the department of it in which he is employed, as compared with that of the injured servant, is not of primary importance in determining the master’s liability. Under the second rule, the test is mainly the relation of the offending servant to the master and to the injured servant. If in what he does he acts for and represents the master, and therefore *pro hac vice* is the master, then his negligence is the master’s negligence. Under this rule, the rank or grade of the offending servant in his master’s business and the department in which he works are regarded as of primary importance in determining the master’s liability.”⁶⁷ It may be noted in passing that the burden is upon the plaintiff to prove that he and the servant, by whose negligence he was injured, were not “fellow-servants.”⁶⁸

⁶⁶ Boston, etc., Ry. v. McDuffy, the U. S. court for the district of 79 Fed. 934 (1897). The contract Vermont.

of hiring was in Vermont, where the fellow-servant rule existed, while the injury happened in Lower Canada, where the rule did not obtain; and recovery was allowed in 67. Kelley v. New Haven Steam-boat Co., 75 Conn. 42, 50 At. 871 (1902).

68. Chicago City Ry. v. Leach, 208 Ill. 198, 70 N. E. 222 (1904).

198. Nature and Character of the Negligent Act. In jurisdictions where this test prevails, a servant may occupy a dual position. If employed to perform an act, incident to any of the five classes of duties which the law imposes upon the master, and which we have considered at length, he is, as to that act, a vice-principal—a true representative of his master—and his negligence is the master's negligence. If employed to do any other act, he is a mere servant, no matter what his rank, and for injuries resulting to fellow-servants from his misconduct, the master is not liable. Accordingly, the superintendent of a manufactory was held a fellow-servant, in letting on steam on an engine and starting a wheel, which other servants were at the moment lifting off its centre.⁶⁹ On the other hand, the storekeeper of a steamship line was held a vice-principal, in providing apparatus for use in putting the stores on board the ship.⁷⁰

199. Nature of the Act Test. The test adopted in the foregoing cases, that the responsibility of the master to a servant for misconduct of another servant is determined by the nature of the act in question, and not by the rank or grade of the actor, has been accepted by the United States Supreme Court,⁷¹ after some hesitation,⁷² and by most of the State courts.⁷³

^{69.} *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. R. 521 (1880); *S. P. U. S.* 377, 5 Sup. Ct. 184, 28 L. Ed. McLaine v. Head, etc., Co., 71 N. 787 (1884).
^{70.} *Nordt Deutscher Co. v. Inge-* H. 294, 52 At. 545, 58 L. R. A. 462 (1902); *O'Neil v. Great Nor. Ry.*, 80 Minn. 27, 82 N. W. 1086, 51 L. R. A. 532 (1900).

^{71.} *Nordt Deutscher Co. v. Inge-* 102 Cal. 458, 36 Pac. 803 (1894); *bregsten*, 57 N. J. L. 400, 31 At. 619 Kelley v. New Haven Steamboat Co., (1895); *S. P. Olney v. Boston, etc.,* 74 Conn. 343, 50 At. 871 (1902); *Ry.*, 71 N. H. 427, 52 At. 1097 (1902).
^{72.} *Chicago, etc., Ry. v. Ross*, 112 157, 22 At. 1094, 29 Am. St. R. 181 (1891); *Carleton Mining Co. v.* 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772 (1893); *New Eng. Ry. v. Ryan*, 29 Col. 401, 68 Pac. 279 (1902); *Camp & Bros. v. Hall*, 39 85, 44 L. Ed. 181 (1889); *Weeks v.* Fla. 535, 22 So. 492 (1897), modified by chap. 4071, L. 1891; *New Pitts-* 372 (1901); *Lafayette Bridge Co. v.* 136 Ind. 398, 35 N. E. 7, 43 Am. St. R. 327 (1893); *Peterson v. Whitebreast* Olsen, 108 Fed. 335, 54 L. R. A. 33, with full note (1901).

200. Superior Servant Test. This test has been applied by the Ohio courts from the beginning; those courts characterizing the test which prevails generally in this country as "contrary to the general principles of law and justice."⁷⁴ According to these tribunals: "The implied obligation of the servant to assume all risk incident to the employment, including that of injury occasioned by the negligence of a fellow-servant, has no application where the servant, by whose negligent conduct or act the injury is inflicted, sustains a relation of superior in authority to the one receiving the injury;" but the true rule is, "that where one servant is placed by his employer in a position of subordination to, and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury."⁷⁵

- Coal Co., 50 Ia. 673, 32 Am. R. 143 (1879), modified by § 1307 of Code; Blake v. Maine C. Ry., 70 Me. 60, 35 Am. R. 297 (1879); Norfolk v. Hoover, 79 Md. 263, 29 At. 994, 47 Am. St. R. 392, 25 L. R. A. 770 (1894); Moody v. Hamilton Mfg. Co., 159 Mass. 70, 34 N. E. 185, 38 Am. St. R. 396 (1893); Schroeder v. Flint, 103 Mich. 213, 61 N. W. 663, 50 Am. St. R. 354, 29 L. R. A. 321 (1894); Brown v. Winona Ry., 27 Min. 162, 38 Am. R. 285, 6 N. W. 484 (1880), modified by chap. 13 L. 1887, and § 2701 Genl. St. 1894; McMaster v. Ill. C. Ry., 65 Miss. 264, 4 So. 59, 7 Am. R. 653 (1887), modified by § 193 Const. of 1890, and § 3559 Code of 1892; Goodwell v. Mont., etc., Ry., 18 Mont. 293, 45 Pac. 210 (1896); Galvin v. Pierce, 72 N. H. 79, 54 At. 1014 (1903); Knutter v. N. Y., etc., Tel. Co., 67 N. J. L. 646, 52 At. 565 (1902); Hankins v. N. Y., etc., Ry., 142 N. Y. 416, 37 N. E. 466, 40 Am. St. R. 616, 25 L. R. A. 396 (1894); Ell v. Nor. Pac. Ry., 1 N. Dak. 336, 48 N. W. 222, 26 Am. St. R. 621, 12 L. R. A. 97 (1891); Mast v. Kern, 34 Or. 247, 54 Pac. 950, 75 Am. St. R. 580, with extensive note (1898); Casey v. Penn. Asphalt Co., 198 Pa. 348, 47 At. 1128 (1901); Milhench v. E. Jenckes Mfg. Co., 24 R. I. 131, 52 Atl. 687 (1902); Davis v. Cent. Vt. Ry., 55 Vt. 84, 45 Am. R. 590 (1883); Norfolk, etc., Ry. v. Phillips, 100 Va. 362, 41 S. E. 726 (1902); Trigg W. R. Co. v. Lindsay, 101 Va. 193, 43 S. E. 349 (1903); Jackson v. Norfolk, etc., Ry., 43 W. Va. 280, 27 S. E. 278, 31 Id. 258, 46 L. R. A. 337 (1897); Wiskie v. Montello Granite Co., 111 Wis. 443, 87 N. W. 461, 87 Am. St. R. 885 (1901).
74. Little Miami Ry. v. Stevens, 20 Ohio, 415 (1851); Cleveland, etc., R. Co. v. Keary, 3 Oh. St. 201 (1854); Whalan v. Mad. River, etc., R. Co., 8 Oh. St. 249 (1858).
75. Berea Stone Co. v. Kraft, 31 Ohio St. 287, 27 Am. R. 510 (1877).

This test, with varying modifications, has been adopted by the courts of several States,⁷⁶ and by legislation in others.⁷⁷

201. Injuries Due to Negligence of Master and Fellow-Servant. Whenever a servant's injury is legally traceable to the master's negligence, the latter cannot escape liability by showing that the harm was due in part to the negligence of a fellow-servant.⁷⁸

76. *Fort Smith Oil Co. v. Slover*, W. 211 (1893); *Sweeny v. Gulf, etc.*, 58 Ark. 168, 24 S. W. 106 (1893); *St. Louis, etc., Ry. v. Thurmond*, 70 Ark. 411, 68 S. W. 488 (1902). See *Const. 1874, art. 17, § 12 and § 6247 Sand & H. Dig.*; *Taylor v. Geo. Marble Co.*, 99 Ga. 512, 27 S. E. 768, 59 Am. S. R. 238 (1896); *Moore v. Dublin Cotton Mills*, 127 Ga. 609, 56 S. E. 839 (1907); see *Code of 1882, §§ 2083, 2202, 3033, 3036*; *Chicago, etc., Ry. v. Kelly*, 127 Ill. 637, 21 N. E. 203 (1889); *St. Louis, etc., Ry. v. Weaver*, 35 Ks. 412, 11 Pac. 408 (1886); *Volz v. Chesapeake Ry.*, 95 Ky. 188, 24 S. W. 119 (1893); *Edmonson v. Ken. Cen. Ry.*, 105 Ky. 479, 49 S. W. 200 (1899); *Illinois Cent. Ry. v. Josey*, 110 Ky. 342, 61 S. W. 703, 54 L. R. A. 78 (1901); *Dobson v. N. O., etc., Ry.*, 52 La. Ann. 1127, 27 So. 670 (1900); *Sherwin v. St. Jos, etc., Ry.*, 103 Mo. 378, 15 S. W. 442, 23 Am. St. R. 881 (1890); *New Omaha Co. v. Baldwin*, 62 Neb. 180, 87 N. W. 27 (1901): "Our court has said the satisfactory evidence of vice principalship is his supervision, control and subjection to his orders and directions." *Mason v. Richmond, etc., Ry.*, 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. R. 814 (1892); *Lamb v. Littman*, 131 N. C. 978, 44 S. E. 646 (1903); *Jenkins v. Richmond, etc., Ry.*, 39 S. C. 507, 18 S. E. 182, 39 Am. St. R. 750 (1893); *Illinois Cent. Ry. v. Spence*, 93 Tenn. 173, 23 S. W. 211 (1893); *Sweeny v. Gulf, etc., Ry.*, 84 Tex. 433, 19 S. W. 555, 31 Am. St. R. 71 (1892); *Reddon v. Union Pac. Ry.*, 5 Utah, 344, 15 Pac. 262 (1887); *Pool v. Southern P c*, 20 Utah, 210, 58 Pac. 326 (1899); *Keating v. Pac. Steamship Co.*, 21 Wash. 415, 58 Pac. 224 (1899); *Allend v. Spokane Falls Ry.*, 21 Wash. 324, 53 Pac. 244 (1899).

77. Several of these statutes have been referred to in previous notes. See also *Mass. R. L. 1901, ch. 106*; *Colorado Sess. L. 1901, ch. 67, Sess. L. N. Y. 1902, ch. 600*. *Bailey, Personal Injuries Relating to Master and Servant* (Chicago, 1897); *Dresser, Employer's Liability* (St. Paul, 1902), *Supplement* (1905); *Judd v. Letts*, 158 Cal. 359, 111 Pac. 12, 41 L. R. A. N. S. 156 and case note (1910); *Betchman v. Seaboard Air Line Co.*, 75 S. C. 68, 55 S. E. 140 (1906), applying art. 9, § 15 of State Const.; *Thornton's Federal Employer's Liability and Safety Appliance Acts* (1912); *Lake Shore & M. S. Ry. v. Benson*, 85 Oh. St. 215, 97 N. E. 417, 41 L. R. A. N. S. 49 and extended note on Federal Act (1912).

78. *Grand Trunk Ry. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493 (1883); *Loveless v. Standard Gold Co.*, 111 Ga. 427, 42 S. E. 741 (1902); *Chicago, etc., Ry. v. Gillison*, 173 Ill. 264, 50 N. E. 657, 64 Am. St. R. 117 (1898); *Towns v. Vicksburg, etc., Ry.*, 37 La. Ann. 630, 55 Am. R. 508

If, however, the master's negligence has only a remote connection with the harm, while the efficient, proximate negligence is wholly that of a fellow-servant, the master will not be liable.⁷⁹

202. Limitations of the Fellow-Servant Rule. It is quite apparent from the statement of the rule and the reasons in support of it, that it does not apply to a servant who, at the time of the injury, is not serving his master, or at least is not in a position of danger by reason of his contract of service. Accordingly, a railroad employee, who has finished his day's work, and is moving along a highway near his employer's road, is not subject to the fellow-servant rule when hurt by the careless throwing of wood from the train by a trainman.⁸⁰ Nor is such an employee, when riding as a gratuitous passenger, after his working hours.⁸¹ If, however, the employee is a passenger, or otherwise upon the master's vehicles or premises, in the course of his employment, he is subject to the fellow-servant rule.⁸² Which of these positions a servant occupies, at a particular time, is a question of fact, and if the evidence warrants more than one inference, the question is for the jury.⁸³

(1885); *Ellis v. N. Y., etc., Ry.*, 95 N. Y. 546 (1884); *Bodle v. Charleston, etc., Ry.*, 66 S. C. 302, 44 S. E. 943 (1903); *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896, 92 Am. St. R. 847 (1902); *Wilmington Mining Co. v. Fulton*, 205 U. S. 60, 75, 27 Sup. Ct. 419 (1907). *Tenn.* 460, 58 S. W. 861, 51 L. R. A. 886 (1900); *Peterson v. Seattle Co.*, 23 Wash. 615, 63 Pac. 539, 53 L. R. A. 586, containing a full review of the authorities (1900). *Contra*, *Ionnone v. N. Y., etc., Ry.*, 21 R. I. 452, 44 At. 592, 79 Am. St. R. 812 (1899).

79. *Carter v. Lockey Piano Case Co.*, 177 Mass. 91, 58 N. E. 476 (1900); *Philadelphia Iron Co. v. Davis*, 111 Pa. 597, 56 Am. R. 305 (1886); *Fowler v. Chicago, etc., Ry.*, 61 Wis. 159 (1884).

80. *Fletcher v. Baltimore, etc., Ry.*, 168 U. S. 135, 18 Sup. Ct. 35 (1897).

81. *Dickinson v. West End Ry.*, 177 Mass. 365, 59 N. E. 60, 52 L. R. A. 328 (1900); *McNulty v. Penn. Ry.*, 182 Pa. 479, 38 At. 524, 38 L. R. A. 376, 61 Am. St. R. 721 (1897); *Chattanooga, etc., Co. v. Venable*, 105

82. *Gillshannon v. Stony Brook Ry.*, 10 Cush. (64 Mass.) 228 (1852); *Boyle v. Columbia, etc., Co.*, 182 Mass. 93, 102, 64 N. E. 726 (1902); *Russell v. Hudson Ry.*, 17 N. Y. (1858); *Wright v. Northampton, etc., Ry.*, 122 N. C. 852, 29 S. E. 100 (1898); *Holmes v. Great Nor. Ry.* (1900), 2 Q. B. 409, 69 L. J. Q. B. 854. See 3 Col. L. Rev. 49-51, note on *Orman v. Salvo*, 117 Fed. 233 (1902).

83. *Northwestern Pack. Co. v. McCue*, 17 Wall (U. S.) 508 (1873).

203. There Must Be a Common Master. This is quite apparent from the very terms of the fellow-servant rule. In the language of Lord Herschell: "It is obvious that if the exemption results, as it does according to the authorities, from the injured person having undertaken, as between himself and the person he serves, to bear the risks of his fellow-servant's negligence, it can never be applicable when there is no relation between the parties from which such an undertaking can be implied."⁸⁴ Hence, the employees of an independent contractor are not the fellow-servants of the employee of him for whom the contractor is working;⁸⁵ nor are palace-car company employees fellow-servants with the trainmen of the railroad company hauling the cars;⁸⁶ nor are the employees of different railroad companies using the same track or premises.⁸⁷ When the servant of A is put under the temporary control of B, in order to render him subject to the fellow-servant rule, it must appear that the servant has assented to the transfer of his services to B, and that he has in fact submitted himself to the direction and control of this new master. "This assent may be established by direct proof that he agreed to accept the new master and to submit himself to his control, or by indirect proof of circumstances justifying the inference of such assent. Such evidence may be strong enough to justify a court in removing the question from the jury, or it may require to be submitted to the jury."⁸⁸

⁸⁴ *Johnson v. Lindsay* (1891), A. R. 514, 26 L. R. A. 718 (1894), S. P. C. 371, 65 L. T. 97.

⁸⁵ *Cameron v. Nystrom* (1893), A. C. 308, 63 L. J. P. C. 85; *The Yeo-mans v. Contra Costa Co.*, 44 Cal. 71 (1872); *Blair v. Erie Ry.*, 66 N. Y. 313, 23 Am. R. 55 (1876).

⁸⁶ *Lou-than v. Hewes*, 138 Cal. 116, 70 Pac. 1065 (1902); *Cruselle v. Pugh*, 67 Ga. 430, 44 Am. R. 724 (1881); *Lake Super. Co. v. Erickson*, 39 Mich. 492, 33 Am. R. 423 (1878); *Jansen v. Mayor Jersey City*, 61 N. J. L. 243, 39 At. 1025 (1898); *Hal-lett v. N. Y. C. Ry.*, 167 N. Y. 543, 60 N. E. 653 (1901); *Noll v. Phil. Ry.*, 163 Pa. 504, 30 At. 157 (1894); *Cunningham v. Int. Ry.*, 51 Tex. 503, 32 Am. R. 632 (1879).

⁸⁷ *Zeigher v. Danbury, etc., Ry.*, 52 Conn. 543 (1885); *Wabash, etc., Ry. v. Peyton*, 106 Ill. 534, 46 Am. R. 705 (1883); *Phil., etc., Ry. v. State*, 58 Md. 372 (1882); *Penn. Ry. v. Gallagher*, 40 Ohio St. 637, 48 Am. R. 689 (1884); *Phillips v. Chic., etc., Ry.*, 64 Wis. 475 (1885); *Bos-worth v. Rogers*, 82 Fed. 975 (1897).

⁸⁸ *Del. L. & W. Ry. v. Hardy*, 59 N. J. L. 35, 38, 34 At. 986 (1896); *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101 (1893). Cf. *Ewan v. Lip-pincott*, 47 N. J. L. 192, 54 Am. R.

204. The Servants Must Be Engaged in a Common Employment. It is not enough to bring employees within the fellow-servant rule that they have a common master. They must be so associated in his employment, "that the safety of the one servant must in the ordinary and natural course of things depend on the skill and care of the other."⁸⁹ Accordingly, it has been held that the crews of different vessels of the same owner are not necessarily within the fellow-servant rule.⁹⁰ Whether they are subject to it, depends upon the question, Does the safety of one crew depend upon the skill and care of the other? Or, to put it in another way, Is injury by the negligence of one crew an ordinary risk of the service of the other? Applying the same test, there can be no doubt that a telegraph operator who transmits the orders for trains is a fellow-servant with a trainman;⁹¹ nor that the crews of different trains are fellow-servants, whenever the safety of the one depends upon the conduct of the other;⁹² nor that the mate of a vessel is a fellow-servant of a table-waiter;⁹³ nor that a railroad track laborer is a fellow-servant of a conductor on a train going over the same track;⁹⁴ nor that a carpenter at work on an elevator shaft is a fellow-servant of the one operating the elevator.⁹⁵

205. Different Department Doctrine; Habitual Association. In a few States, the fellow-servant rule is subject to what is known as the "different department limitation." Where this doctrine prevails, "in order that one servant should be a fellow-servant of another, their duties must be such as to bring them into habitual association, so that they may exercise a mutual influence upon

148 (1885); *Murray v. Dwight*, 161 Tenn. Ry. v. De Armond, 86 Tenn. N. Y. 301, 55 N. E. 901, 48 L. R. A. 73, 5 S. W. 600, 6 Am. S. R. 816 673 (1900); *Union Steamship Co. v. (1887)*, applying the different department test. *Claridge* (1894), A. C. 185, 63 L. J. P. C. 56.

⁸⁹. *Blackburn, J., in Morgan v. 17 Sup. Ct. 345 (1897); Van Avery Vale of Neath Ry., 5 B. & S. 736, L. v. Union Pac. Ry., 35 Fed. 40 (1888). R. 1 Q. B. 149, 35 L. J. Q. B. 23 (1864).*

⁹⁰. *The Petrel*, (1893), P. 320, 62 L. J. P. 92, 1 R. 651.

⁹¹. *Slater v. Jewett*, 85 N. Y. 61, 39 Am. R. 627 (1881). Contra, *East*

⁹². *Oakes v. Mase*, 165 U. S. 363, 17 Sup. Ct. 345 (1897); *Van Avery v. Union Pac. Ry.*, 35 Fed. 40 (1888).

⁹³. *Livingston v. Kodiak Packing Co.*, 103 Cal. 263, 37 Pac. 149 (1894).

⁹⁴. *Fagundes v. Cent. Pac. Ry.*, 79 Cal. 97, 21 Pac. 437 (1889).

⁹⁵. *Mann v. O'Sullivan*, 126 Cal. 61, 58 Pac. 375 (1899).

each other promotive of proper caution,"⁹⁶ or they must be actually co-operating with each other in the line of employment.⁹⁷

206. The Servant's Liability for His Torts. Although the master is liable for his servant's torts, within the limits heretofore described, and is the one against whom the injured party ordinarily proceeds, the servant is also liable. The law does not permit a tort-feasor to shield himself behind the command of his master.⁹⁸ In a limited class of cases, it is true, a servant's or agent's conduct is not treated as a tort, although it assists the principal or master in perpetrating an actionable wrong; as where the servant receives property from the master, honestly believing that it belongs to the latter, and delivers it to another without notice that the master has no right to it.⁹⁹ As a rule, however, the servant is liable *ex delicto* (for conversion, trespass, or other tort) when he invades a legal right of the true owner or other person, though his act be innocent of intentional wrong, and be done under the master's command.¹⁰⁰

Again, a servant whose willful or negligent misconduct causes injury to a fellow-servant is liable to the latter therefor, although

96. *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315, 50 N. E. 225, 64 Am. St. R. 38 (1898); *Chic., etc., Ry. v. Moranda*, 93 Ill. 302, 34 Am. R. 168 (1879); *Louisville, etc., Ry. v. Collins*, 2 Duv. (63 Ky.) 114, 87 Am. Dec. 486 (1865); *Angel v. Jellico Coal Co.*, 115 Ky. 728, 74 S. W. 714 (1903); *Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638 (1860); *Krogg v. Atlantic, etc., Ry.*, 77 Ga. 202, 4 Am. St. R. 79 (1886); *Coal Creek Mining Co. v. Davis*, 90 Tenn. 711, 18 S. W. 387 (1891).

99. *Burditt v. Hunt*, 25 Me. 419 (1845); *Gurley v. Armstead*, 148 Mass. 267, 19 N. E. 389 (1889); *Leuthold v. Fairchild*, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218 (1886); *Walker v. First Nat. Bank*, 43 Ore. 102, 72 Pac. 635 (1903); *Hodgson v. St. Paul Plow Co.*, 78 Minn. 172, 80 N. W. 956, 50 L. R. A. 644 with valuable note (1899).

100. *Swim v. Wilson* 90 Cal. 126, 27 Pac. 33, 13 L. R. A. 605, 25 Am. St. R. 110 (1891); *Kimball v. Billings*, 55 Me. 147 (1867); *Robinson v. Bird*, 158 Mass. 357, 33 N. E. 391 (1893); *Bercich v. Marye*, 9 Nev. 312 (1874); *Donahue v. Shippee*, 15 R. I. 453 (1887); *Dollitt v. Robbins*, 83 Minn. 498, 86 N. W. 772, 85 Am. St. R. 464 (1901); *Johnson v. Martin*, 87 Minn. 370, 92 N. W. 221 (1902). See further discussion of this topic in Chapter XII, *infra*.

97. *Illinois Steel Co. v. Bauman*, 178 Ill. 351, 53 N. E. 107, 69 Am. St. R. 316 (1899).

98. *Perkins v. Smith*, 1 Wil. 328 (1752); *Stephens v. Elwall*, 4 M. & S. 259 (1815): "It is no answer that he acted under authority from another who had no authority to bestow." *Rice v. Yocum*, 155 Pa. 538, 26 At. 698 (1893).

the victim may not be able to recover from the master, because of the fellow-servant rule.¹

207. Servant's Liability for Non-Feasance. While the authorities are agreed that an agent or servant is individually responsible for his misfeasance, they are at variance regarding his liability for non-feasance. The theory that he is not liable seems to have been first suggested in an argument by Coke,² and to have received the first judicial sanction in a dictum of Lord Holt.³ It was accepted by Judge Story, who urged in its support, that the agent's or servant's liability in such "cases is solely to his principal, there being no privity between him and such persons, but the privity exists only between him and his principal."⁴

Undoubtedly, when the servant or agent owes no legal duty to a third person, such person cannot make out a cause of action in tort against him, by showing that his neglect to perform a duty, owing to the master, has been followed by injury to himself, the third person.⁵ If the master owed such person a duty, his neglect to perform it would render him answerable for injury caused thereby; and such liability is all that the injured party needs or can claim. But when the servant or agent has taken full possession of his master's or principal's property, and has agreed to keep it in repair, or to do other acts upon or about it, whose performance is necessary to the safety of third persons, it would seem that he has

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| <p>1. <i>Daves v. Southern Pac. Ry.</i>, 98 Cal. 19, 32 Pac. 708 (1893); <i>Miller v. Staples</i>, 3 Col. App. 93, 32 Pac. 81 (1893); <i>Hinds v. Harbou</i>, 58 Ind. 121 (1877); <i>Martin v. Louisville, etc., Ry.</i>, 95 Ky. 612, 26 S. W. 801 (1894); <i>Osborne v. Morgan</i>, 137 Mass. 1 (1884); <i>Steinhauser v. Spraul</i>, 114 Mo. 551, 21 S. W. 515 (1892); <i>Schumpert v. Southern Ry.</i>, 65 S. C. 332, 43 S. E. 813 (1903); <i>Greenberg v. Whitcomb Lumber Co.</i>, 90 Wis. 225, 63 N. W. 93, 28 L. R. A. 439, 48 Am. St. R. 911 (1895); <i>Warax v. Cincinnati, etc., Ry.</i>, 72 Fed. 637 (1896); <i>Helms v. Nor. Pac. Ry.</i>, 120 Fed. 389 (1903); <i>Brower v. Northern Pac. Ry.</i>, 109 Minn. 385,</p> | <p>124 N. W. 10, 25 L. R. A. N. S. 354 (1910).
 2. <i>Marsh v. Astry</i>, Cro. Eliz. 175 (1590).
 3. <i>Lane v. Cotton</i>, 12 Mod. 472, 488 (1701): "A servant or deputy, as such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance, an action will lie against a servant or deputy, but not as a deputy or servant, but as a wrongdoer."
 4. Story on Agency, § 308.
 5. <i>Hill v. Caverly</i>, 7 N. H. 215 (1834); <i>Calvin v. Holbrook</i>, 2 N. Y. 126 (1848).</p> |
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voluntarily assumed a duty towards such persons, as well as towards his employer; and must respond accordingly for its non-performance. This view is sustained by the weight of modern authority,⁶ although some courts have felt constrained to characterize such misconduct of the agent or servant as misfeasance⁷ rather than non-feasance. Other courts prefer the views of Holt and Story, that agents or servants are not liable to third persons for mere omissions of duty, but only for the actual commission of some positive wrong.⁸

208. Tort Liability of Servant to Master. If the agent or servant unjustifiably assaults his employer, or wrongfully injures⁹ or converts¹⁰ his property, he is liable to him in tort, precisely as he would be to any other person. But in many cases, the master has the option to proceed against the servant or agent in tort, when but for the relationship between them he would be limited to an action for a breach of contract. Even in the absence of an express stipulation on the subject, it is an implied term of the contract of employment, that the employee will be loyal to his employer, and abstain from misconduct harmful to him. For a breach of these

6. *Mayer v. Thompson-Hutchinson Co.*, 104 Al. 611, 16 So. 620, 28 L. R. A. 433, 53 Am. St. R. 88 (1894); *Baird v. Shipman*, 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. R. 504 (1890); *Lough v. John Davis, etc., Co.*, 30 Wash. 204, 70 Pac. 491 (1902). See 3 Col. Law Rev. 116-118, for an excellent discussion of this topic. *Murray v. Cowherd*, 148 Ky. 591, 147 S. W. 6, 40 L. R. A. N. S. 617 (1912); *Ellis v. Southern Ry.*, 72 S. C. 465, 52 S. E. 228, 2 L. R. A. N. S. 378 (1905).
7. *Osborne v. Morgan*, 130 Mass. 102, 39 Am. R. 437 (1881); *Ellis v. McNaughton*, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. R. 308 (1889); *Lottman v. Barnett*, 62 Mo. 159 (1876); *Horner v. Lawrence*, 37 N. J. L. 46 (1874); *Consolidated Gas Co. v. Conner*, 114 Md. 140, 78 At. 725, 32 L. R. A. N. S. 809 (1910).
8. *Dean v. Brock*, 11 Ind. App. 507, 38 N. E. 829 (1894); *DeLaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. R. 456 (1882); *Feltus v. Swan*, 62 Miss. 415 (1884); *Denny v. Manhattan Ry.*, 5 Den. (N. Y.) 639 (1848); *Van Antwerp v. Linton*, 89 Hun. 417 (1895); *Drake v. Hogan*, 108 Tenn. 265, 67 S. W. 470 (1902); *Lobadie v. Hawley*, 61 Tex. 177, 48 Am. R. 278 (1884); *Carey v. Roche-reau*, 16 Fed. 87 (1883); *Bryce v. Southern Ry.*, 125 Fed. 958 (1903).
9. *Mobile, etc., Ry. v. Clanton*, 59 Al. 392, 31 Am. R. 15 (1877); *Zulkee v. Wing*, 20 Wis. 498, 91 Am. Dec. 425 (1866).
10. *Scott v. Rogers*, 31 N. Y. 676 (1864); *Laverty v. Sneathen*, 68 N. Y. 522, 23 Am. R. 184 (1877).

engagements, the master has a remedy either in a contract¹¹ or a tort action,¹² as he may prefer.¹³ Ordinarily, he prefers the latter; and if his property has been damaged by the servant's misconduct,¹⁴ or if he has been compelled to pay damages to third persons,¹⁵ because of such misconduct, he proceeds in tort against the servant.

209. Joint Actions Against Master and Servant. Whenever the master is an active participant with the servant in the commission of a tort, or has actually authorized, commanded or ratified it, he may be joined with the servant in a tort action for redress.¹⁶ Thus far, all authorities are agreed. If, however, the servant is the only actual wrongdoer, and the master's liability is due solely to his position as master, the right of the injured party to join them as defendants is a question upon which the authorities differ.

In England, this right seems to be unquestioned,¹⁷ although a

11. *Bixby v. Parsons*, 49 Conn. 483, 489, 44 Am. R. 246 (1882): "The plaintiff seeks to recover the wages on the contract of hiring. The cases show that the seducer of defendant's daughter broke that contract, and these damages resulted to the defendant in consequence of the breach. This gives the defendant the same right to recoup the damages that he would have had, if the servant (the plaintiff) had intentionally killed the defendant's horse, or burned his dwelling, for in such cases the contract of hiring would be broken."

12. *Greenfield Savings Bank v. Simons*, 133 Mass. 415 (1882).

13. See *supra*, ¶ 20 and *Industrial & Gen. Trust Co. v. Tod*, 170 N. Y. 233, 63 N. E. 285 (1902), holding the agent liable only for breach of contract.

14. *Mobile, etc., Ry. v. Clanton*, 59 Al. 392, 31 Am. R. 15 (1877); *Odd Fellows' Assoc. v. James*, 63 Cal. 598, 49 Am. R. 107 (1883); *Zulkee v. Wing*, 20 Wis. 408, 91 Am. Dec. 425 (1866).

15. *Smith v. Foran*, 43 Conn. 244, 21 Am. R. 647 (1875); *Georgia Southern Ry. v. Jossey*, 105 Ga. 271, 31 S. E. 179 (1898); *Grand Trunk Ry. v. Latham*, 63 Me. 177 (1874); *Costa v. Yoachim*, 104 La. 170, 28 So. 932 (1900); *Compagnie de Nav. Fran. v. Burlay*, 183 Fed. 166 (1910), plaintiff recovered damages from a harbor pilot for loss sustained by his negligence, in anchoring vessel in an unlawful place.

16. *Petrie v. Lamont*, 1 Car. & M. 93, 96 (1841); *Hill v. Caverly*, 7 N. H. 215, 26 Am. Dec. 735 (1834); *Caldwell v. Sacra*, *Littell's Select Cases* (Ky.) 118, 12 Am. Dec. 285, and cases cited in note thereto (1811); *Hewlett v. Swift*, 3 Allen (85 Mass.) 420 (1862).

17. *Michael v. Alestree*, 2 Lev. 172, S. C., *sub. nom.* *Mitchell v. Alestree*, 1 Vent. 295; *Mitchell v. Alestry*, 3 Keb. 650 (1687); *Moreton v. Hovdorn*, 4 B. & C. 223, 10 E. C. L. 316 (1825); *Steel v. Lester*, 3 C. P. D. 121 (1877).

learned writer has suggested that "it is better generally to sue only the master."¹⁸ The weight of authority in this country seems to accord with the English decisions. In the leading case on this side of the controversy, the learned judge said:¹⁹ "In a case of strict negligence by a servant while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence, at the same time, and under the same circumstances; the servant in fact, and the master constructively, by the servant, his agent." This doctrine has been repeatedly approved in New York,²⁰ and has been accepted in many other jurisdictions.²¹

210. The Opposite View. The leading case, in opposition to this view, is that of *Parsons v. Winchell*.²² According to this decision, "the act of the servant is not the act of the master, even in legal intendment," in cases such as we are now considering. "The master is liable not as if the acts were done by himself, but because the law makes him liable," while the servant is liable because of his personal act in doing the wrong. Liabilities created on two such wholly different grounds, it is declared, cannot and ought not to be joint.²³ Moreover, it is urged, "if the master and servant were

18. Smith, *Master and Servant* from the relation of master and (5th Ed.), 285, note t. servant they are united or identified in the same tortious act resulting in the same injury."

19. Cowen, J., in *Wright v. Wilcox*, 19 Wend (N. Y.) 343, 32 Am. Dec. 507 (1838). *Howe v. Northern Pac. Ry.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949 (1902); *McHugh v. Nor. Pac. Ry.*, 32 Wash. 30, 72 Pac. 450 (1903); *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 63 N. W. 93, 28 L. R. A. 439, 48 Am. S. R. 911 (1895); *Charman v. Lake Erie Ry.*, 105 Fed. 449 (1900); *Riser v. Southern Ry.*, 116 Fed. 215 (1902).

20. *Suydam v. Moore*, 8 Barb. (N. Y.) 358 (1850); *Montfort v. Hughes*, 3 E. D. Smith (N. Y.) 591 (1854); *Phelps v. Walt*, 30 N. Y. 78 (1864).

21. *Chicago & A. Ry. v. Wise*, 206 Ill. 453, 69 N. E. 500, 503 (1903); *Chesapeake & O. Ry. v. Dixon*, 104 Ky. 608, 47 S. W. 615 (1898); *S. C.* in 179 U. S. 131, 21 Sup. Ct. (1900), but this point left undecided by the Supreme Court. *Winston's Adm'r. v. Ill. Cent. Ry.*, 111 Ky. 954, 65 S. W. 13, 55 L. R. A. 603 (1901); *Wright v. Compton*, 53 Ind. 337 (1876); *Schumpert v. Southern Ry.*, 65 S. C. 322, 43 S. E. 813 (1903): "Both are liable jointly, because

22. 5 Cush. (59 Mass.) 592, 52 Am. Dec. 745 (1850).

23. *Warax v. Cincin. etc., Ry.*, 72 Fed. 637 (1896); *Helms v. Nor. Pac. Ry.*, 120 Fed. 389 (1903); *Mulchey v. Methodist Relig. Soc.*, 125 Mass. 487 (1878); *Clark v. Fry*, 8 Ohio St. 385 (1858).

jointly liable to an action, the judgment and execution would be against them jointly as joint wrongdoers, and the master, if he alone should satisfy the execution, could not call on the servant for reimbursement, nor even for contribution.”²⁴

The last objection seems to be without force; for the master could certainly obtain reimbursement from the negligent servant if himself free from actual fault. Even as between joint tort-feasors, contribution is allowed, if they are not intentional wrongdoers.²⁵

211. Employers' Liability Statutes. The common law liability of employers, as set forth in preceding paragraphs, has been modified greatly by State and federal legislation. It is not possible, here, to do more than outline, briefly, the most important changes wrought by such legislation. First, it limits, to a varying extent, the common law right of master and servant to contract for the former's exemption from liability to the latter.²⁶ Second, it imposes upon the employer the duty of providing various safety appliances, at the peril of absolute liability for injuries sustained by servants if such appliances are absent.²⁷ Third, the defense of fellow service is modified or abolished.²⁸ Fourth, the defense of contributory negligence on the part of the injured servant is taken away or curtailed.²⁹

212. Workmen's Compensation Acts. These have modified the common law liability of employers even more radically than the legislation above described. They have taken various forms

²⁴. *Campbell v. Portland Sugar Co.*, 62 Me. 553, 16 Am. R. 503 (1873); *Page v. Barker*, 40 N. H. 47 (1860).

²⁵. *Palmer v. Wick, etc., Co.* (1894), A. C. 318; *Armstrong County v. Clarion County*, 66 Pa. 218 (1870).

²⁶. *Mondou v. New York, N. H. & H. Ry.*, 223 U. S. 1, 52, 32 Sup. Ct. 169, 38 L. R. A. N. S. 44 (1912). Cited also as *Second Employers' Liability Cases*.

²⁷. *Chicago, B. & Q. Ry. v. United States*, 220 U. S. 559, 31 Sup. Ct. 612 (1911).

²⁸. *El Paso & N. E. Ry. v. Gutierrez*, 215 U. S. 87, 30 Sup. Ct. 21 (1909), affg. 102 Tex. 378, 117 S. W. 426 (1909).

²⁹. *Kelley v. Great Nor. Ry.*, 152 Fed. 211 (1907), and cases cited in the opinion; *Thornton's Federal Employers' Liability Act*, §§ 44-84 (2d Ed. 1912).

in this country, and some of the statutes have been declared unconstitutional;³⁰ while others have been held valid.³¹ Their principal features are described in the cases cited, as well as in various text books.³²

30. *Ives v. South Buffalo Ry.*, 201 (1912); *Borgnis v. Falk Co.*, 147 N. Y. 271, 94 N. E. 431, 23 Ann. Wis. 327, 133 N. W. 209, 37 L. R. A. Cases, 156 and note, 34 L. R. A. N. S. 489 (1911); *State ex rel. N. S.* 162 and note (1911); *Cunningham v. North Western Imp. Co.*, 44 Wash. 156, 117 Pac. 1101, 37 L. R. Mont. 180, 119 Pac. 554 (1911). *Davis-Smith Co. v. Clausen*, 65 A. N. S. 466 (1911).

31. *State ex rel. Yapple v. Creamer*, 88 Oh. St. 349, 97 N. E. 602 **32.** *Boyd on Workmen's Compensation*, (1913).

CHAPTER V.

REMEDIES.

§ 1. DEVELOPMENT OF REMEDIES.

213. **Historical Sketch.** The history of remedies for torts presents four stages of development. In primitive ages, the law, so far as it deals at all with this topic, throws upon the victim the duty of redressing his injuries—it “expects men to help themselves when they have been wronged.”¹ It is true that “self-help” of this sort more frequently resulted in punishing the wrongdoer than in compensating the party who had been wronged. It took the form of the right of “feud,” or private warfare, to revenge an injury, rather than the right of distraining property of the wrongdoer as a means of coercing him to pay money or do an act. And yet, the right of “distress” is probably as old as the right of “feud.”²

Undoubtedly, this policy of early law is due, in part, to the weakness of the primitive state. As government becomes more powerful, and as experience discloses the wastefulness and inefficiency of “self-help,” courts of justice are opened for the settlement of private disputes, and the law-suit is offered to the disputants as “an alternative to private reprisals, a mode of stanching personal or hereditary blood-feuds other than slaughter or plunder.”³ During this second stage of legal development, the law-suit is only an alternative. The person harmed is not bound to seek redress in a court of justice. Private warfare may still be waged. Even if the wrongdoer is brought into court and a judgment rendered against him, he can refuse to abide by the decision. The court, at that time, “had no power of directly enforcing its decrees. The man who disobeyed the order of the court went out of the law: his kinsmen ceased to be responsible for his acts, and the kinsmen of those who injured him became also irresponsible;

1. Pollock and Maitland, *History v. Fisher*, 16 Phil. (Pa.) 170 (1883).
of English Law (1st Ed.), 572.

3. Maine, *Early Law and Custom*,

2. *Ibid.*, p. 573; Markby, *Elements of Law* (5th Ed.), 826-830; Furbush

and thus he carried his life in his hand." The earliest service of courts of justice "to mankind was to furnish an alternative to savagery, not to suppress it wholly." ⁴

The third stage of development is marked by a stringent prohibition of "self-help" in almost every direction. It is thought of as "an enemy of the law, a contempt of the King and his court. * * * The man who is not enjoying what he ought to enjoy should bring an action; he must not disturb an existing seizure, be it of land, of chattels, or of incorporeal things, be it of liberty, of serfage or of the marital relationship." ⁵

During the later middle ages, according to the authority just quoted, the law became laxer on this topic, and at present is "permanently lax. * * * In our own day, our law allows an amount of quiet self-help that would have shocked Bracton. It can safely allow this, for it has mastered the kind of self-help that is lawless."

§ 2. SELF-HELP.

214. Defense of Self and Property. This form of self-help, which the early common law discountenanced, but which the law now tolerates, has been considered to some extent already,⁶ and will be referred to hereafter, in connection with trespass to person and to property. It is sufficient, at this time, to state very briefly the rules relating to forcible re-entry upon lands, and to forcible recaption of chattels.

215. Forcible Entry and Detainer. Prior to 1381, the common law permitted a man to regain by force lands of which he was forcibly disseized. Under pretense of enforcing this right, powerful men forcibly ejected their weaker neighbors and retained possession of lands thus acquired. To remedy this evil, statutes were enacted in the latter part of the fourteenth century, prohibiting, under pain of criminal punishment, the forcible entry into⁷ and the detainer of⁸ lands, except in cases where the entry or detainer was given by law. These statutes, as subsequently amended in

⁴ Ibid., p. 387.

⁵ Pollock and Mattland, *History of English Law* (1st Ed.), p. 572.

⁶ Ante, ch. III, § 6.

⁷ 5 Ric. II, c. 7 (1381).

⁸ 15 Ric. II, c. 2 (1391).

England,⁹ have become a part of the common or statute law of most of our States. Their object, it has been declared, is "to prevent any and all persons, with or without title, from assuming to right themselves with the strong hand, after feudal fashion, when peaceable possession cannot be obtained, and to compel them to the more pacific course of suits in court, where the weak and strong stand upon equal terms."¹⁰

The statute of Henry VI provided that the person forcibly turned out or kept out, in violation of the statutes of Richard II, should be restored to his possession. It followed, therefore, that if a person, rightfully entitled to possession, gained such possession by forcible entry, he should be punished for the breach of the peace by a fine to the King, *and* by losing the possession thus illegally acquired;¹¹ but he was not liable in damages to the wrongful occupant whom he had forcibly ejected or repelled,¹² except "for an independent wrong; some act which could be justified only if he was in lawful possession."¹³

216. In this country, neither the statutes nor the decisions are uniform upon these points. Some States punish forcible entry and detainer as crimes, but do not give a civil action against one guilty of these offenses, if he was entitled to possession, either for trespass, *quare clausum fregit*, or for damages to the wrongful occupant.¹⁴ But, in most jurisdictions, even the owner of land who is

9. Hen. VI, c. 9 (1430); 31 Eliz. c. 11 (1589); 21 Jac. I. c. 15 (1623).

10. *Vinson v. Flynn*, 64 Ark. 453, 43 S. W. 146, 39 L. R. A. 415 (1897).

11. Pollock, *Torts* (6th Ed.), p. 370.

12. *Ibid.*, Clerk and Lindsell, *Torts* (2d Ed.), 286-8. *Harvey v. Brydges*, 14 M. & W. 437 (1845).

13. *Beddall v. Maitland*, 17 Ch. D. 174, 50 L. J. Ch. 401 (1881), holding that the wrongful occupant could not recover damages for forcible eviction, but could for injury to his furniture which was put out of the house.

14. *Page v. Dwight*, 170 Mass. 29, 48 N. E. 850, 39 L. R. A. 418 (1897):

"Upon the whole, we think the better view is that the legislature, after making first trial of the ancient system under which a possession ended by force might be restored without regard to title or right of possession, thought it better to provide that those only who had a right of possession should be put in by the courts, and to leave to the criminal law the acts of one who, being entitled to possession, takes it by prohibited force." *Low v. Elwell*, 121 Mass. 309, 23 Am. R. 272 (1876), "landlord not liable for force upon person of tenant necessary to effect his removal, after the termination of his tenancy." *Mug-*

entitled to immediate possession is not allowed to take the law into his own hands, and gain possession by the exercise of force which amounts to a breach of the peace. If he acquires possession in that way, he may be compelled to restore it and pay damages for trespass upon the property, as well as for injuries inflicted upon the persons of the wrongful occupants who resist the wrongful entry.¹⁵ If, however, he can gain possession peaceably, he may resort to force to retain it, without being chargeable with wrongful detainer,¹⁶ and he may resort to force to eject a mere trespasser.^{16a}

217. Forcible Recaption of Chattels. In England, there seems to be no doubt that he who is entitled to the immediate possession of a chattel is legally justified in using whatever force is reasonably necessary to recover it, either from a trespasser, or from an innocent third person claiming under the trespasser.¹⁷ There is no statute relating to such forcible recapture, similar to those prohibiting forcible entry and detainer, in the case of lands; and it has been judicially declared that, "if the owner was compelled by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the mischief instead of redressing it."¹⁸

Many courts in this country have taken the same view.¹⁹ On the

ford v. Richardson, 6 Allen (88 Y. 427, 24 N. E. 937 (1890); Sinclair v. Stanley, 69 Tex. 718 (1888);
Mass.) 76 (1863), landlord is not liable for assault and battery, who
Dustin v. Cowdrey, 23 Vt. 631
uses only such force as is necessary (1851).

to subdue resisting tenant who is wrongfully in possession. See Sterling v. Warden, 51 N. H. 217, 12 Am. 534 (1878).

R. 80 (1871); Gillespie v. Beecher, 85 Mich. 347, 48 N. W. 561 (1891); 16a. Schwinn v. Perkins, 79 N. J. L. 515, 78 At. 19, 32 L. R. A. N. S. 51 and note (1910).

Allen v. Kelly, 17 R. I. 731, 24 At. 17. Clerk and Lindsell, Torts (2d Ed.), p. 124, Pollock, Torts (6th Ed.), p. 372.

442 (1871); Manning v. Brown, 47 Md. 506 (1877). 18. Blades v. Higgs, 10 C. B. N. S. 713, 30 L. J. C. P. 347 (1861);

15. Denver, etc., Ry. v. Harris, 122 U. S. 597, 607, 7 Sup. Ct. 1286 (1886); Ely v. Yore, 71 Cal. 130 (1886); Larkin v. Avery, 23 Conn. 304 (1854); Reeder v. Purdy, 41 Ill. 279 (1866); Bristol v. Burr, 120 N. Anonymous, Keil, f. 92 pl. 4 (1506), accord.

19. Baldwin v. Hayden, 6 Conn. 453 (1827). In Hemingway v. Hemingway, 58 Conn. 443, 19 At. 766 (1890), the right of forcible recap-

other hand, it has been held that the use of force, amounting to a breach of the peace, is justifiable in defending one's possession against a wrongdoer, but not in regaining a possession which he has lost. "There is no doubt," it is said by these courts, "that one having either the general or special right of property in personal chattels, may, if wrongfully dispossessed thereof, retake them wherever he can find them, provided he can obtain peaceable possession;²⁰ but the law more highly regards the public peace than the right of property of a private individual, and therefore forbids recaption to be made in a riotous or forcible manner."²¹

Even in jurisdictions holding this doctrine, the right of the owner to forcibly rescue his property from a thief is recognized.²² Such force is employed, it is said, in defense of the owner's legal possession, and not to regain a possession which has been lost. And some of the authorities cited above, as following the English decisions, may not have been intended to stand for any broader doc-

tion seems to be limited to cases of peaceful remedies would prove "momentarily interrupted possession," cases where there is ground equally efficacious, should not be sustained."

for saying that the recaptor is virtually exercising the right of defense; *Comm. v. Donahue*, 148 Mass. 529, 20 N. E. 171, 2 L. R. A. 623, 12 Am. S. R. 591 (1889); same doctrine, *Hopkins v. Dickson*, 59 N. H. 235 (1879); *Moore v. Shenk*, 3 Pa. 13, 45 Am. Dec. 618 (1846), *semble*; *Anderson v. State*, 6 Baxt. (65 Tenn.) 608 (1872); *Hodgeden v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167 (1846); *Hite v. Long*, 6 Rand. 457 (Va.), 18 Am. Dec. 719 (1828); *State v. Dooley*, 121 Mo. 591, 26 S. W. 558 (1894). At p. 599, the court says:

"Where one's property is taken with felonious intent * * * great force may be resorted to with propriety; but where there is clearly no felony, but mere dispute as to legal ownership, a resort to violence, disproportionate to the value of the property, and where peaceful remedies would prove equally efficacious, should not be sustained."

20. *Stanford v. Howard*, 103 Tenn. 24, 52 S. W. 140 (1899), recapture of money lost at poker.

21. *Bobb v. Bosworth*, 2 Littell, (Ky.) 81, 12 Am. Dec. 273 (1808); *Story v. State*, 71 Al. 329, 338 (1882); *Winter v. Atkinson*, 92 Ill. App. 162 (1899); *Andre v. Johnson*, 6 Blackf. (Ind.) 375 (1843); *Stuyvesent v. Wilcox*, 92 Mich. 233, 239, 52 N. W. 465, 31 Am. St. R. 580 (1892); *Bowman v. Brown*, 55 Vt. 184 (1882); *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670 (1862); *Bliss v. Jonson*, 73 N. Y. 529, 534 (1878); *Davis v. Whitridge*, 16 S. C. 575 (1881); *Kirby v. Foster*, 17 R. I. 437, 22 At. 1111, 14 L. R. A. 317, with note (1892); *Sabre v. Mott*, 88 Fed. 780 (1898).

22. *Gyre v. Culver*, 47 Barb. (N. Y.) 592 (1867).

trine than the right of defending legal possession, as distinguished from physical custody.²³

218. **Entering Another's Premises to Retake Property.** If A's chattels have been wrongfully placed by B, or with his consent, upon his premises, or if B has sold to A personal property thus located, the law creates a license in A's favor to enter and take the property.²⁴ Such a license exists also in favor of the owner of cattle, driven along the highway, when they wander upon adjoining lands without the owner's fault.²⁵ As this license is created by the law, it cannot be revoked by the land owner.²⁶ While, however, he has no legal authority to revoke the license, if he does prohibit A from entering, the latter is not justified in resorting to force and violence to overcome B's opposition, but must resort to legal process,²⁷ except in those jurisdictions which permit one to use force in retaking his property.²⁸

23. In *Johnson v. Perry*, 56 Vt. 77 Am. Dec. 231 (1861); *Emerson* 703, 48 Am. R. 826 (1884), the court said: "We should not be disposed to extend the law of the *Hodgeden v. Hubbard* case (18 Vt. 504). But we are not disposed to overrule it; or to adopt a rule, that when one man goes on to another's premises, without leave or license, and undertakes to carry away his property, the latter cannot interfere to stop it."

24. *Chapman v. Thumblethorp*, *Croke Eliz.* 329 (1594); *Patrick v. Colerick*, 3 M. & W. 483 (1838); *Cunningham v. Yeomans*, 7 Sup. Ct. Rep. (N. S. Wales) 149 (1868); *Wheeldon v. Lowell*, 50 Me. 499 (1862); *McLeod v. Jones*, 105 Mass. 403, 405 (1870); *Chambers v. Bedell*, 2 W. & S. (Pa.) 225 (1841).

25. *Goodwyn v. Chevely*, 4 H. & N. 631, 28 L. J. Ex. 298 (1859); *Hartford v. Brady*, 114 Mass. 466, 19 Am. R. 377 (1874).

26. *Wood v. Manley*, 11 A. & E. 34 (1839); *White v. Elwell*, 48 Me. 360,

77 Am. Dec. 231 (1861); *Emerson v. Shores*, 95 Me. 237, 239, 49 At. 1051 (1901); *McLeod v. Jones*, 105 Mass. 403, 406 (1870).

27. *Herndon v. Bartlett*, 4 Porter (Al.) 481, 494 (1837); *Chase v. Jefferson*, 1 Houst. (Del.) 257 (1856); *Blount v. Mitchell*, 1 Taylor (N. C.) 131 (1798); *Salisbury v. Green*, 17 R. I. 758, 24 At. 787 (1892); *Roach v. Damon*, 2 Humph. (21 Tenn.) 425 (1841).

28. *Lambert v. Robinson*, 162 Mass. 34, 37 N. E. 753, 44 Am. S. R. 326 (1894): "A person who has a right to enter upon the land of another, and there do an act, may use what force is required for that purpose, without being liable to an action. If he commits a breach of the peace, he is liable to the commonwealth. If he uses excessive force, he is liable to a personal action for an assault." *Yale v. Seely*, 15 Vt. 221 (1843); *Mills v. Wooters*, 59 Ill. 234 (1871).

219. Distress as a Form of Self-Help. This ancient remedy of the common law, "whereby a party in certain cases is entitled to enforce a right or obtain redress for a wrong in a summary manner by seizing chattels and detaining them as a pledge until satisfaction is obtained,"²⁹ still exists; but, in this country, its exercise is regulated with much particularity by statute.³⁰ At present, therefore, it partakes far more of the nature of legal process than of "self-help."³¹ In not a few jurisdictions, as a means of collecting rent — its most important function at common law — it has been abolished by statute, or is treated as obsolete.³² What has been said of distress for rent is substantially true of the right to distrain trespassing cattle. It is in the main a statutory right.³³

220. Abatement of Nuisances. This is not only one of the most ancient³⁴ forms of "self-help," but also one of the most important at the present time. If A permits trees to grow upon his land so near B's line that the boughs overhang, or the roots penetrate the soil of B's premises, the latter may abate the nuisance by cutting off the boughs and the roots.³⁵ Some courts declare that B ought to

29. Clerk & Lindsell, *Torts* (2d Ed.), chap. 12; *Stewart v. Benninger*, 138 Pa. 437, 21 At. 159 (1891).

30. See 9 Am. & Eng. Enc. of Law (2d Ed.), title *Distress*; same title in 14 Cyc. 523; *Machine Co. v. Hinkley*, 23 S. D. 509, 122 N. W. 482 (1909), "distress for taxes is not a judicial process."

31. *Flury v. Grimes*, 52 Ga. 342 (1874); *Patty v. Bogle*, 59 Miss. 491, (1882).

32. *Herr v. Johnson*, 11 Col. 393, 18 Pac. 342 (1888); *Garrett v. Hughlett*, 1 Har. & J. (Md.) 3 (1800); *Dutcher v. Culver*, 24 Minn. 584, 594 (1877), referring to C. 140 L. 1877; *Marye v. Dyche*, 42 Miss. 347 (1869); *Hosford v. Ballard*, 39 N. Y. 150 (1868), referring to ch. 274, L. 1846; *Crocker v. Mann*, 3 Mo. 472 (1834); Utah, Genl. Laws 1898, §§ 1407, 1408, substitute a landlord's lien on the tenant's property for the right of

distress; Wis. Gen. Laws 1898, § 2181, abolishes distress for rent.

33. *Oil v. Rowley*, 69 Ill. 469 (1873); *Frazier v. Nortinus*, 34 Ia. 82 (1871); *Northcote v. Smith*, 4 Ohio C. C. R. 565 (1890); *Mooney v. Maynard*, 1 Vt. 470 (1829).

34. Bracton, *DeLegibus Angliae*, Lib. 3, f. 233: "But those things which have thus been raised to cause a tortious nuisance * * * may be immediately and recently, whilst the misdeed is flagrant (as in the case of other disseysines) demolished and thrown down, * * * if the complainant is sufficient to do it; but, if not, he must have recourse to him who protects rights." At p. 234 the learned author advises the victim of a nuisance to proceed by an assize of nuisance rather than by abatement by his own act.

35. *Lemmon v. Webb*, 63 L. J. Ch. 570 (1894), 3 Ch. 1, 12, Lindley, L. J.

content himself with this remedy, and, if he brings an action for damages, when the injury to his property is nominal, should be turned out of court because he is prosecuting a vexatious and groundless suit.³⁶ Such is not the prevailing view, however. He may abate the action by his own act; but he is not bound to pursue this course.³⁷ He is entitled to go into a court of justice for the recovery of damages.

221. Risk of Abating. Indeed, a person takes no little risk when he ventures upon abating a nuisance by his own act.³⁸ While he is not bound to save the property which constitutes the nuisance,³⁹ he is bound to exercise a care, commensurate with the exigencies of the situation, and if valuable property is destroyed by reason of his failure to exercise such care, he is liable to its owner for damages.⁴⁰ The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action;⁴¹ and also when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of obstruction across a highway,

"This has been declared to be the state superintendent of canal re-law for centuries," citing 2 Brooke pairs, had to pay \$1,856.14 and costs Abr. "Nuisances," p. 105, pl. 28 for destroying plaintiff's canal boat (1493); Norris v. Baker, 1 Roll. 293 although it was an obstruction to (1617), and later authorities; S. C. canal navigation: Bowden v. Lewis, affirmed (1895), A. C. 1, 64 L. J. Ch. 13 R. I. 189, 43 Am. R. 21 (1881). 205; Hickey v. Mich. Cen. Ry., 96 Mich. 498, 55 N. W. 989, 21 L. R. A. 39. McKeesport Sawmill Co. v. Penn. Co., 122 Fed. 184 (1903); 729, with note, 35 Am. S. R. 621 Kendall v. Green (N. H.), 42 At. (1893). 178, 183 (1896); Mark v. Hudson River Bridge Co., 103 N. Y. 28, 8 N. E. 243 (1886); Philiber v. Matson, 14 Pa. 306 (1850); Harrington v. Edwards, 17 Wis. 586, 86 Am. Dec. 768 (1863).

36. Countryman v. Lighthill, 24 Hun. (N. Y.) 405 (1881) cf.; Granda v. Lovdal, 78 Cal. 611, 11 Pac. 623, 12 Am. St. R. 121 (1889).

37. Buckingham v. Elliott, 62 Miss. 296, 52 Am. R. 188 (1884); Missouri, etc., Ry. v. Burt (Tex. Civ. App.), 27 S. W. 948 (1894).

38. People ex rel. Copcutt v. Board of Health, Yonkers, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. S. R. 522 (1893); Hicks v. Dorn, 42 N. Y. 47 (1870). Defendant, the

40. Gumbert v. Wood, 146 Pa. 370, 23 At. 404 (1891).

41. Anonymous, Y. B. Ed. IV. f. 34, pl. 10 (1469); Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53 (1865); California Civil Code, §§ 3495, 3502, modifying Gunter v. Geary, 1 Cal. 462 (1851).

and an unauthorized bridge over a navigable watercourse, if he has occasion to use the way, he may remove the obstruction ⁴² by way of abatement." But this principle does not justify private citizens in breaking into a saloon where spirituous liquors are sold in violation of law, and destroying the liquors and saloon fixtures. The illegal business "is exclusively a public nuisance; and the fact that the husbands, wives, children, or servants of any persons do frequent such a place and get intoxicating liquor there, does not make it a special nuisance or injury to their private rights, so as to authorize and justify such persons in" forcibly abating it.⁴³

Even when a public nuisance causes such special damage to individuals as to give them a civil action against the wrongdoer, they must be careful, in attempting to abate it by their own acts, not to go further than is necessary to protect themselves. The fact that a nuisance is maintained in a particular building, does not authorize the destruction of the building,⁴⁴ unless that is essential to the abatement of the nuisance.⁴⁵

Notice of intention to abate a nuisance is rarely necessary,⁴⁶ except when entry must be made upon the wrongdoer's land to effect the abatement, or human life will be endangered if notice is not given.⁴⁷ Vicious animals, whose continued existence endangers human life, may be killed by anyone without notice.⁴⁸

42. *James v. Hayward Croke*, 184 (1631); *Hubbard v. Charles*, 184 (1631); *Hubbard v. Deming*, 21 Conn. 356 (1851); *Marcy v. Taylor*, 19 Ill. 634 (1858); *Brown v. DeGross*, 50 N. J. L. 409 (1887); *State v. Parrott*, 71 N. C. 311, 17 Am. R. 5 (1874); *Lancaster T. Co. v. Rogers*, 2 Pa. 114, 44 Am. Dec. 179 (1845); *Selman v. Wolfe*, 27 Tex. 68 (1863); *Larson v. Furlong*, 63 Wis. 323 (1885).

44. *Brightman v. Inhabitants of Bristol*, 65 Me. 443, 20 Am. R. 711 (1876); *Clark v. Ice Co.*, 24 Mich. 508 (1872); *Griffith v. McCullum*, 46 Barb. (N. Y.) 561 (1866).

43. *Brown v. Perkins*, 12 Gray (78 Mass.) 89 (1858); *Goodsell v. Fleming*, 59 Wis. 52 (1883); *Ely v. Supervisors*, 36 N. Y. 297 (1867); *Moody v. Supervisors*, 46 Barb. (N. Y.) 659 (1866); *State v. Paul*, 5 R. I. 185 (1858); *State v. Keeran*, 5 R. I. 497 (1858); *Nation v. District of Columbia*, 34 App. D. C. 453, 26 L. R. A. N. S. 996 and note (1910).

45. *Meeker v. VanRensselaer*, 15 Wend. (N. Y.) 397 (1836), cited with approval in *Lawton v. Steele*, 119 N. Y. 226, at 236 (1890); *Fields v. Stokely*, 99 Pa. 306, 44 Am. R. 109 (1882).

46. *Jones v. Williams*, 11 M. & W. 176 (1843); *Estes v. Kelsey*, 8 Wend. (N. Y.) 555 (1832).

47. *Jones v. Jones*, 1 H. & C. 1, 31 L. J. Exch. 506 (1845); *Lane v. Copesey* (1891), 3 Ch. 411; Cal. Civil Code, § 3503.

48. *Woolf v. Chalker*, 31 Conn. 121. 129 (1862); *Brill v. Flagler*, 23

§ 3. DAMAGES.

222. Action for Damages Is the Ordinary Tort Remedy. Although the victim of a tort may resort to "self-help," as we have seen, and, in some cases, may appeal to a court of equity⁴⁹ for relief, his ordinary remedy is a common-law action for damages. If the wrong is a maritime tort, that is, a wrong committed upon public navigable waters of the United States, but of such a character as had it been committed upon the land, it would have been remediable by a common-law action for damages,⁵⁰ it is within the jurisdiction of the Federal Admiralty Courts; although the injured party may have the option of bringing a common-law action.⁵¹ If he proceeds in admiralty, not only will the litigation be conducted in accordance with the rules of practice⁵² of that tribunal, but will be governed by the peculiar rules of the substantive law of admiralty. One of these is that admiralty will not entertain a suit for merely nominal damages for a personal tort.⁵³ Another is that a public corporation is answerable for the torts of the master and crew of a vessel which it owns, although it is employed in the performance of police duties; and, by the rule of the common law, in the jurisdiction where the torts were committed, the doctrine of *respondeat superior* does not apply to such a corporation.⁵⁴ On the other hand, if a valid claim for maritime tort exists, it may be pursued in admiralty by proceedings *in rem*, and the claimant is not limited to an action *in personam*,⁵⁵ while, if the injured party

Wend. (N. Y.) 354 (1840); *Brown v. Carpenter*, 26 Vt. 638 (1854).

49. Keener's Cases on Equity Jurisdiction, Vol. 1, Chaps. 5, 6 and 7; Pomeroy's Equity Jurisprudence, §§ 1346-1358; Story's Equity, §§ 909-950. *Infra*, chap. xvii, § 3.

50. *Holmes v. Oregon, etc., Ry.*, 5 Fed. 75 (1880); *Waring v. Clarke*, 5 How. (U. S.) 451 (1847).

51. *Schooner Robt. Lewis v. Kekanoha*, 114 Fed. 849, 52 C. C. A. 483 (1902); *Martin v. West*, 222 U. S. 191, 32 Sup. Ct. 42, 36 L. B. A. N. S. 592 (1911), collision between a

vessel and a supporting pier of a bridge.

52. *Wm. Johnson & Co. v. Johansen*, 86 Fed. 886 (1898); *The Saginaw*, 95 Fed. 703 (1899); *In re Cent. Ry. of N. J.* 95 Fed. 700 (1899).

53. *Barnett v. Luther*, 1 Curtis C. 434 (1853); *In re Calif. Nav. and Imp. Co.*, 110 Fed. 670 (1901).

54. *Workman v. New York City*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314 (1900).

55. *The Albert Dumols*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751 (1900); *The Northern Queen*, 117 Fed. 906 (1902).

goes into a common-law court for redress, his action must be *in personam*.

223. Damages Are of Three Sorts. The common law recognizes three species of damages in tort actions; (1) nominal, (2) compensatory or ordinary, and (3) punitive or exemplary. In a few jurisdictions, the third class has been placed under statutory or judicial taboo. "It is not the province of the jury," according to the view prevailing in these jurisdictions, "after full damages have been found for the plaintiff, so that he is fully compensated for the wrong committed by the defendant, to mulct the defendant in an additional sum to be handed over to the plaintiff, as a punishment for the wrong he has done to the plaintiff."⁵⁶

224. Nominal Damages. Tort actions are often brought for the purpose of securing a judicial vindication of a right, rather than a money compensation. In such cases, the plaintiff claims and is awarded only nominal damages, such as a penny or a shilling, or six cents or a dollar. Actions for the diversion of a water course,⁵⁷ for the trespass⁵⁸ to person or to property, or for wrongful interference with one's right to vote,⁵⁹ are the most common examples. When "a clear legal right of a party is invaded, in consequence of another's breach of duty," the former is entitled to an action against the latter for at least nominal damages.⁶⁰ Nor can

⁵⁶ *Wilson v. Bowen*, 64 Mich. 133, J. L. 589, 25 At. 356 (1892); *Dixon* 141 (1877); *Lucas v. Mich. Cen. Ry., v. Clow*, 24 Wend. (N. Y.) 188 (1840); 98 Mich. 1, 56 N. W. 1039 (1893); *Casebeer v. Mowry*, 55 Pa. 419, 93 Barnard v. Poor, 21 Pick. (38 Mass.) Am. Dec. 766 (1867), jury assessed 378 (1838); *Riewe v. McCormick*, 11 damages at three cents.

Neb. 261 (1881); *Fay v. Parker*, 53 N. H. 342 (1873); *Spokane Truck Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072 (1891).

⁵⁷ *Webb v. Portland Manufacturing Co.*, 3 Sumn. (U. S. Cir. Ct.) 189, Fed. Cases, No. 17, 322 (1838); *Blodgett v. Stone*, 60 N. H. 167 (1880).

⁵⁸ *Leonard v. Castle*, 78 Cal. 454 (1889), damage fixed by jury at one dollar; *Wartman v. Swindell*, 54 N.

⁵⁹ *Ashby v. White*, 2 Ld. Raymond, 938 (1703).

⁶⁰ *Clifton v. Hooper*, 6 Ad. & E. (N. S.) 468, 14 L. J. Q. B. 1 (1837); *Texarkana, etc., Ry. v. Anderson*, 67 Ark. 123, 53, S. W. 673 (1899), passenger negligently carried beyond her station, but no actual damage shown; *Fullman v. Stearns*, 30 Vt. 454 (1858); *Slingerland v. Int. Contg. Co.*, 169 N. Y. 60, 61 N. E. 995, 56 L. R. A. 499 (1901).

this action be defeated by proof that such invasion has actually benefited the plaintiff.⁶¹

In the foregoing cases, the trifling amount of damages awarded to the plaintiff casts no reflection upon him. When, however, his action is brought not simply for a judicial affirmance of his legal right which has been invaded, but for substantial money damages, and only a nominal sum is given, the verdict is clearly disparaging. A typical example of this kind is an action for defamation, where the wrongdoing is clearly established, but the jury award six cents damages. Clearly they believe that plaintiff's reputation was too bad to be appreciably injured by the utterance. They are forced to find in his favor,⁶² for an absolute right—the right of reputation—has been invaded without justification; but whether he shall receive nominal damages or a substantial sum is for them to decide.⁶³

225. Ordinary or Compensatory Damages. In the ordinary tort action, damages are sought and awarded with a view of compensating the plaintiff for the pecuniary injury which he has sustained. If the sod or tillable soil of land has been wrongfully carried off, the owner is not entitled to the cost of actually replacing the sod or the soil, but to the difference between the value of the land before and after the injury.⁶⁴ So, if fruit or shade trees or fences are destroyed, the wrongdoer is not bound to replace them, nor to pay the cost of planting like trees or of rebuilding the fences with the same sort of material, but to fairly compensate the injured owner for the damage done to his realty.⁶⁵ It is true that this is not always measured by the difference in the market value of the land before and after the injury. "The owner of property has a right to hold it for his own use as well as to hold it for sale,

⁶¹ *Jewett v. Whitney*, 43 Me. 242 for the defendant. (1857); *Stowell v. Lincoln*, 11 Gray (77 Mass.), 434 (1858); *Jones v. Hannovan*, 55 Mo. 462 (1874); *Murphy v. Fond Du Lac*, 23 Wis. 365, 99 Am. Dec. 181 (1868).
⁶² In *Jones v. King*, 33 Wis. 422 (1873), the court admitted that the verdict should have been in plaintiff's favor, for nominal damages, yet refused to set aside a verdict
⁶³ *Gray v. Times Publishing Co.*, 74 Minn. 452, 77 N. W. 204 (1898).
⁶⁴ *Witham v. Kershaw*, 16 Q. B. D. 613 (1885).
⁶⁵ *Dwight v. El. C. & N. Ry.*, 132 N. Y. 199, 30 N. E. 398, 15 L. R. A. 612, 28 Am. St. R. 563 (1892); *Norfolk, etc., Ry. Co. v. Bohannon*, 85 Va. 293, 297, 7 S. E. 236 (1888).

and if he has elected the former, he should be compensated for an injury wrongfully done him in that respect, although that injury might be unappreciable to one holding the same premises for purposes of sale."⁶⁶

Whether a person who has been mutilated by the negligence of another is entitled to compensatory damages for humiliation or injured feelings, because of disfigurement, or loss of functional ability, is a question upon which the authorities are at variance.^{66a} But the weight of authority accords the right.^{66b}

226. Punitive or Exemplary Damages. In some jurisdictions, as we have seen already, these damages are not awarded. "The aim of the law which gives redress for private wrongs is compensation to the injured, rather than the prevention of a recurrence of the wrong." And yet, say the courts, holding this view, "The law recognizes the fact that an injury may be intensified by the malice or willfulness or oppressiveness or recklessness of the act, and allows damages commensurate with the injury when these elements are present."⁶⁷ Hence any manifestation of malevolent motives on the part of the defendant may enhance damages, not by way of punishing him, but as a compensation for the plaintiff's injured feelings.⁶⁸ As damages of this sort are deemed punitive or exemplary by other courts,⁶⁹ the results reached in the different jurisdictions are not very dissimilar.

⁶⁶ *Gilman v. Brown*, 115 Wis. 1, 91 N. W. 227 (1902); *Montgomery v. Lock*, 72 Cal. 75, 13 Pac. 401 (1887); *Ohio & M. Ry. v. Trapp*, 30 N. E. 812, 4 Ind. App. 69 (1891); *McMahon v. City of Dubuque*, 107 Ia. 62, 77 N. W. 517, 70 Am. St. R. 143 (1898).

mick v. King, 107 Me. 376, 78 At. 468 (1910); *Shortridge v. Scarritt Estate Co.*, 145 Mo. App. 295, 130 S. W. 126 (1910).

⁶⁷ *Lucas v. Michigan Cent. Ry.*, 98 Mich. 1, 56 N. W. 1039 (1893); *People v. Pearl*, 76 Mich. 207, 42 N. W. 1109 (1889).

^{66a} *Harrod v. Bisson*, 48 Ind. App. 549, 93 N. E. 1093 (1911), and authorities cited, denying recovery.

⁶⁸ *Morgan v. Kendall*, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445 (1890); *Mahony v. Belford*, 132 Mass. 393 (1882); *Burt v. Advertiser Co.*, 154 Mass. 238, 28 N. E. 1 (1891); *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. R. 475 (1875).

^{66b} *McDermott v. Sever*, 202 U. S. 600, 26 Sup. Ct. 709 (1906); *U. S. Express Co. v. Wahl*, 168 Fed. 848, 94 C. C. A. 260; *Partridge v. Boston & M. Ry.*, 184 Fed. 211, 107 C. C. A. 49 (1910), injury made child-bearing dangerous for plaintiff; *Cor-*

⁶⁹ *Chappell v. Ellis*, 123 N. C. 259, 31 S. E. 709, 68 Am. St. R. 822 (1898); *In Runyan v. Cent. Ry. of*

In a few States, the doctrine obtains, that, if the tort is one which is criminally punishable, punitive damages are not recoverable in a civil action,⁷⁰ or that a criminal conviction and fine may be considered by the jury in mitigation of civil damages.⁷¹ In support of this view it is said that "punishment for offenses should be inflicted only by public prosecution in due course of the law of the land, under those safeguards which are rooted and grounded in the maxims of the common law, and guaranteed by the constitution of our political government;" that if punitive damages are recoverable in a civil action, in such cases, "the defendant might be punished twice for the same act."⁷²

To this, it is answered, that the constitutional provision, that no person for the same offense shall twice be put in jeopardy, applies only to strictly criminal prosecutions; that the judgment in the criminal action is for the wrong to the State, while the judgment in the civil suit is for the private wrong to the plaintiff; that if a criminal conviction and fine is a bar to the victim's claim to punitive damages, it is equally a bar to any tort action for the wrongdoing.⁷³

227. Against Whom Punitive Damages Allowable? As these damages are given not by way of compensation to the plaintiff, but by way of punishment to the defendant, they are allowable, as a rule, against those only who have committed a tort, deliberately or recklessly. A wrong due to ordinary negligence merely will not

N. J. 65 N. Y. L. 228, 47 At. 422 110 (1879).

(1900), damages for injured feelings are held compensatory.

70. *Wabash Printing Co. v. Crumrine*, 123 Ind. 89, 21 N. E. 904 (1889).

71. *Thamagan v. Womack*, 54 Tex. 45 (1880); *Rhodes v. Rogers*, 151 Pa. 634, 24 At. 1044 (1892).

72. *Austin v. Wilson*, 4 Cush. (58 Mass.) 273, 50 Am. Dec. 766, with note (1849); *Boyer v. Barr*, 8 Neb. 68, 30 Am. R. 814 (1878); *Riewe v. McCormick*, 11 Neb. 264, 9 N. W. 88 (1881); *Fay v. Parker*, 53 N. H. 342, 16 Am. R. 270 (1873); *Huber v. Teuber*, 3 McAr. (D. C.) 484, 36 Am. R.

73. *Smith v. Bagwell*, 19 Fla. 117, 45 Am. R. 12 (1882); *Phillips v. Kelly*, 29 Al. 628 (1857); *Bundy v. Maginess*, 76 Cal. 532, 18 Pac. 668 (1888); *Hause v. Griffith*, 102 Ia. 215, 71 N. W. 223 (1897); *Chilles v. Drake*, 2 Met. (59 Ky.) 146 (1859); *Pike v. Dilling*, 48 Me. 539 (1861); *Boetcher v. Staples*, 27 Minn. 308, 38 Am. R. 295 (1880); *Cook v. Ellis*, 6 Hill. (N. Y.) 466 (1844); *Hoadly v. Watson*, 45 Vt. 289, 12 Am. R. 197 (1872); *Brown v. Swineford*, 44 Wis. 282, 28 Am. R. 582 (1878).

justify the award of punitive damages.⁷⁴ The defendant's conduct must have been actually malicious or wanton, displaying a spirit of mischief towards the plaintiff, or of criminal indifference to his rights. Examples of this class of torts are assault and battery of a brutal character, or attended with insulting or indecent language;⁷⁵ false imprisonment, where the plaintiff has been improperly treated, or has been subjected to unnecessary indignity, or the defendant's motives were actually malicious;⁷⁶ defamation of a serious character recklessly or wickedly uttered,⁷⁷ and trespass to person or property where the injury is wanton and malicious, or the result of gross negligence, or of a reckless disregard of the rights of others.⁷⁸

74. *Walker v. Fuller*, 29 Ark. 448 (1897); *Taylor v. Coolidge*, 64 Vt. (1874); *Chesapeake, etc., Ry. v. Judd*, 106 Ky. 364, 50 S. W. 539 (1899); *Louisville, etc., Ry. v. Creighton*, 106 Ky. 42, 50 S. W. 227 (1899); *Sinclair v. Tarbox*, 2 N. H. 135 (1819); *Hansley v. Jamesville, etc., Ry.*, 117 N. C. 565, 23 S. E. 443 (1895); *Mill, etc., Ry. v. Arms*, 91 U. S. 489, 23 L. Ed. 374 (1875).

75. *Bundy v. Maginess*, 76 Cal. 532, 18 Pac. 668 (1888); *Smith v. Bagwell*, 19 Fla. 117, 45 Am. R. 12 (1882); *Berker v. Dannenberg*, 116 Ga. 954, 43 S. E. 463, 60 L. R. A. 559 (1903); *Wood v. Young (Ky.)*, 50 S. W. 541 (1899); *Hanna v. Sweeney*, 78 Conn. 482, 62 At. 785, 4 L. R. A. N. S. 907 (1906); *Distin v. Bradley*, 83 Conn. 466, 76 At. 991 (1910), defendant beat plaintiff with horse-whip; punitive damages in Conn., limited to plaintiff's expenses less taxable costs.

76. *Raza v. Smith*, 65 Fed. 592 (1895); *Thorpe v. Wray*, 68 Ga. 359 (1882); *Hewlette v. George*, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682 (1891); *Craven v. Bloomingdale*, 171 N. Y. 439, 64 N. E. 169 (1902); *Lewis v. Clegg*, 120 N. C. 292, 26 S. E. 772

(1897); *Taylor v. Coolidge*, 64 Vt. 506, 24 At. 656 (1892); *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847 (1897); *Fenelon v. Butts*, 53 Wis. 344 (1881); *Spear v. Hiles*, 67 Wis. 350, 30 N. W. 506 (1886).

77. *Morning Journal v. Rutherford*, 51 Fed. 513, 1 U. S. App. 296, 2 C. C. A. 354, 16 L. R. A. 803 (1892); *Cahill v. Murphy*, 94 Cal. 29, 30 Pac. 195 (1892); *Hintz v. Granpner*, 138 Ill. 158, 27 N. E. 935 (1891); *Lehrer v. Elmore*, 100 Ky. 56, 37 S. W. 292 (1896); *Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020 (1894).

78. *Sears v. Lyons*, 2 Stark. 317 (1818); *Emblem v. Myers*, 6 H. & N. 54, 30 L. J. Ex. 71 (1860); *Parker v. Mise*, 27 Al. 480 (1855); *Merrills v. Tariff Mfg. Co.*, 10 Conn. 384, 27 Am. Dec. 682, with note (1835); *Illinois C. Ry. v. Stewart (Ky.)*, 63 S. W. 596 (1901); *Smalley v. Smalley*, 81 Ill. 70 (1876); *Garland v. Wholeham*, 26 Ia. 185 (1868); *Storm v. Green*, 51 Miss. 103 (1876); *Wort v. Jenkins*, 14 Johns. (N. Y.) 352 (1817); *Polk v. Fancher*, 1 Head. (Tenn.) 336 (1858); *Thirkfield v. Mountain View Cemetery*, 12 Utah, 76, 41 Pac. 564 (1895); *Day v. Woodworth*, 13

228. **Damages Recoverable from Joint Wrong Doers.** If several persons are engaged in committing a tort, the victim may bring one action against all. If he proceeds in this manner, and any of the defendants is not liable for punitive damages, his recovery in the action will be limited to compensatory damages. If he would obtain a judgment for punitive damages he must bring a several action against those wrongdoers whose misconduct renders them liable thereto.⁷⁹

Whether a principal or master is liable to punitive damages for a malicious or wanton tort of his agent or servant, committed within the scope of the latter's authority, is a question upon which the decisions are not entirely agreed. If the principal or master takes an active part with the agent or servant in the commission of the tort, or if he orders or ratifies it, he is liable to punitive damages in every jurisdiction where such damages are recoverable.⁸⁰ If, however, he is not thus connected with the tort, and his liability therefor is due solely to his relationship to the tortfeasor, or, as it is often put, to the doctrine of *respondeat superior*, many courts hold that recovery against him must be limited to compensatory damages, and if the injured person would secure punitive damages, he must proceed against the servant or agent alone. "Exemplary or punitive damages," it is said by these authorities,⁸¹ "being awarded not by way of compensation to the

How. (U. S.) 363 (1851); *Morgan v. Barnhill*, 118 Fed. 24 (1902). In the last cited case, the court charged the jury to return a verdict for both actual and exemplary damages, under Sec. 26 of Art. 16 of the Texas Const. and Arts. 3017, 3018 and 3019 of the R. S. of Texas.

⁷⁹ *Cunningham v. Underwood*, 116 Fed. 803, 53 C. C. A. 99 (1902); *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. R. 317 (1900).

⁸⁰ *Denver, etc., Ry. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146 (1887), the corporation was an active wrong-doer, through its managing agents; *Wheeler & Wilson Co. v. Boyce*, 36 Kan. 350, 13 Pac. 609 (1887), similar to preceding

case; *Stevens v. O'Neill*, 64 N. Y. Supp. 663 (1900), *affd.* 169 N. Y. 375, 62 N. E. 424 (1902); *Bingham v. Lipman, Wolf & Co.*, 40 Or. 363, 67 Pac. 98 (1901), the wrong-doers were the officers of the corporation.

⁸¹ *Lake Shore, etc., Ry. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, with note (1893); *Maisenbacker v. Society Concordia*, 71 Conn. 369, 42 At. 67, 71 Am. St. R. 213 (1899); *Trabing v. Cal. Nav. Co.*, 121 Cal. 137, 53 Pac. 644 (1898); *Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. R. 838 (1884); *Detroit Daily Post v. McArthur*, 16 Mich. 447 (1868); *Forhmann v. Consolidated Trac. Co.*, 63 N. J. L. 391, 43 At. 892 (1899); *Krug v. Pitass*, 162 N. Y. 154,

sufferer, but by way of punishment to the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive, or malicious intent on the part of the agent. * * * Actual guilty intention on the part of the defendant is required to charge him with exemplary or punitive damages."⁸²

229. The Majority View. The weight of authority, however, or at least the majority view, is in favor of according punitive damages against the principal or master, wherever the malicious or grossly negligent act of the agent or servant is within the scope of his authority. It is said by the courts and writers maintaining this doctrine, that the rule of punitive damages is not the result of logic, but of public necessity; that such damages are imposed to deter persons from gross misconduct towards others, and that where anyone, whether a natural or artificial person, transacts his business by agents or servants, the same considerations of public policy apply to him as to one who transacts his business in person. Either he or the injured person must take the risk of the infirmities of temper, the maliciousness and gross misconduct of his agent or servant, and it is but just that he should bear the risk. Especially, say these authorities, is this true in the case of passenger carriers, whose servants have unusual opportunities of abusing and insulting their passengers. Only by a strict enforcement of the rule of punitive damages, it is declared, can these great employers of servants be forced to exercise proper care in the choice, discipline and management of their representatives.⁸³

56 N. E. 526, 76 Am. S. R. 317 N. W. 961, 34 L. R. A. 205 (1896).
 (1900); Craven v. Bloomington, 82 Northern Cen. Ry. v. Newman,
 171 N. Y. 439, 64 N. E. 169 (1902); 98 Md. 507, 56 At. 973 (1904).
 Staples v. Schmid, 18 R. I. 224, 26 83. Highland Ave. Ry. v. Robinson,
 At. 196, 19 L. R. A. 824 (1893); 125 Ala. 483, 25 So. 28 (1900); St.
 Ricketts v. Chesapeake, etc., Ry., 33 Louis, etc., Ry. v. Wilson, 70 Ark.
 W. Va. 423, 10 S. E. 801, 7 L. R. A. 136, 66 S. W. 661 (1902); Chic. B.
 354, 25 Am. St. R. 901 (1890); Evis- & Q. Ry. v. Bryan, 90 Ill. 126 (1878);
 ton v. Cromer, 57 Wis. 570, 15 Am. Citizens, etc., Ry. v. Willooby, 134
 R. 500 (1883); Robinson v. Superior Ind. 563, 33 N. E. 627 (1892); South-
 Rapid Transit Ry., 24 Wis. 345, 68 ern Kan. Ry. v. Rice, 38 Ks. 398.

230. **Punitive damages against municipal corporations** are rarely, if ever, allowed, even in jurisdictions where business corporations are amenable to such damages. Public policy, it is thought, does not require that they be punished for the misdeeds of their representatives.⁸⁴ Very large verdicts against them for personal injuries have been sustained, however, but upon the theory that they represented the honest estimate by a jury of the plaintiff's actual damages, including the pain and suffering incidental to physical injuries.⁸⁵

231. **Punitive Damages for Conversion of Property.** The ordinary measure of damages for the conversion of property is its value, at the time and place of its conversion. This is all that can be recovered, where the conversion is due to an honest mistake of the defendant, or to his negligence.⁸⁶ If, however, it is the result of the defendant's willful or dishonest conduct, he will be compelled, in most jurisdictions, to pay the value of the property at the time and place of the owner's demand for it, even though that has been greatly enhanced by the defendant's expenditure of

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| <p>16 Pac. 817 (1888); Atchison, etc., Ry. v. Henry, 55 Ks. 715, 41 Pac. 952 (1895); Louisville, etc., Ry. v. Balard, 85 Ky. 307, 3 S. W. 530, 7 Am. St. R. 600 (1887); Lexington Ry. Co. v. Cozine (Ky.), 64 S. W. 848 (1901); Goddard v. Grand Trunk Ry., 57 Me. 202 (1869); Balt., etc., Ry. v. Blocher, 27 Md. 277 (1867); Pullman Palace Car Co. v. Lawrence, 74 Miss. 803, 22 So. 53 (1897); Hopkins v. Railroad, 36 N. H. 9 (1857); Purcell v. Richmond, etc., Ry., 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 113 (1891); At. & Great W. Ry. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382 (1869); Phil. Tract. Co. v. Orbann, 119 Pa. 37, 12 At. 816 (1888); Mack v. South Bound Ry., 62 S. C. 323, 29 S. E. 905, 40 L. R. A. 679 (1898); Knoxville Tract. Co. v. Lane, 103 Tenn. 376, 53 S. E. 557 (1899), Sedgwick on Damages (9th Ed.), § 380 and § 371a.</p> | <p>84. Dillon Municipal Corporations (4th Ed.), § 1020; Bennett v. City of Marion, 102 Ia. 425, 71 N. W. 360, 63 Am. St. R. 454 (1897); Wilson v. Wheeling, 19 W. Va. 350, 42 Am. R. 780 (1877); Costich v. City of Rochester, 68 App. Div. (N. Y.) 623, 73 N. Y. Supp. 835 (1902); Sedgwick on Damages (9th Ed.), § 380b and cases cited.</p> <p>85. Collins v. Council Bluff, 32 Ia. 324 (1871), verdict for \$15,000; Shartle v. Minneapolis, 17 Minn. 308 (1871), verdict for \$4,000.</p> <p>86. Central Coal Co. v. John Henry Shoe Co., 69 Ark. 302, 69 S. W. 49 (1901); Livingston v. Rawyards Coal Co., 5 App. Cas. 25, 42 L. T. N. S. 334 (1880); McLean County Coal Co. v. Long, 81 Ill. 359 (1876); Beede v. Lamprey, 64 N. H. 510, 15 At. 133 (1888); Forsyth v. Wells, 41 Pa. 291, 80 Am. Dec. 617 (1861).</p> |
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labor and money upon it.⁸⁷ This rule is applied, by many courts, to an innocent purchaser from a fraudulent converter. He must pay the value of the property at the time he took title,⁸⁸ although, for expenditures subsequently made upon the property, he is to be reimbursed, if the owner takes it from him;⁸⁹ and he is not to be charged with such enhancement of value, if sued for damages.⁹⁰

232. Conversion of Property of Fluctuating Value. The measure of compensatory damages for the conversion of such property varies in different jurisdictions.⁹¹ Most of the cases fall within one of three classes. According to one class, the true measure of damages is the value of the property at the time of conversion, with interest from that date.⁹² According to a second class, "Where either party is to be injured by the casual rise or fall of converted property, it ought to be he who is in the wrong;"⁹³ hence the correct measure of damages is the highest market value to the time of trial.⁹⁴ The rule laid down in a third class of cases is, that

87. *Martin v. Porter*, 5 M. & W. 351 (1839); *Trotter v. McLean*, 13 Ch. D. 574, 42 L. T. N. S. 118 (1879); *Ellis v. Wire*, 33 Ind. 127, 5 Am. R. 189 (1870); *Tuttle v. White*, 46 Mich. 485, 41 Am. R. 175 (1881); *Hughes v. United Pipe Lines*, 119 N. Y. 423, 23 N. E. 1042 (1890); *Benson Mining Co. v. Alta., etc., Co.*, 145 U. S. 428, 12 Sup. Ct. 877 (1892).

88. *Birmingham Min. Ry. v. Tenn. Co.*, 127 Al. 137, 28 So. 679 (1900); *Bolles Wooden Ware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398 (1882); *Tuttle v. White*, 46 Mich. 487, 41 Am. R. 135 (1881); contra, *Railroad Co. v. Hutchins*, 32 Ohio St. 571, 30 Am. R. 629 (1877).

89. Contra, *Wing v. Milliken*, 91 Me. 387, 40 At. 138, 64 Am. S. R. 238 (1898); "The law neither divests him of his property, nor requires him to pay for improvements made without his authority;" *Gaskins v. Davis*, 115 N. C. 85, 20 S. E. 188, 44 Am. S. R. 439, 25 L. R. A. 813 (1894).

90. *Fisher v. Brown*, 70 Fed. 570, 17 C. C. A. 225 (1895).

91. For a full discussion of the cases, see *Joyce on Damages*, chap. 47, and *Sedgwick on Damages* (9th Ed.), chap. 22.

92. *Peterson v. Gresham*, 25 Ark. 380 (1869); *Continental Co. v. Biley*, 23 Col. 160, 46 Pac. 633 (1896); *Sturgis v. Kelth*, 57 Ill. 451, 11 Am. R. 28 (1870); *Gravel v. Clough*, 81 Ia. 272, 46 N. W. 1092 (1890); *Freeman v. Harwood*, 49 Me. 195 (1859); *Whitfield v. Whitfield*, 40 Miss. 352 (1866); *Walker v. Borland*, 21 Mo. 289 (1855); *Boylan v. Huguet*, 8 Nev. 345 (1873); *Pennsylvania Co. v. Phil., etc., Ry.*, 153 Pa. 160, 25 At. 1043 (1893).

93. *Kid v. Mitchell*, 1 N. & Mc. C. (S. C.), 202, 9 Am. Dec. 702 (1818).

94. *Burks v. Hubbard*, 69 Al. 384 (1884); *Moody v. Caulk*, 14 Fla. (1872); *Jaques v. Stewart*, 81 Ga. 81, 6 S. E. 815 (1888); *Stephenson v. Price*, 30 Tex. 715 (1868).

the converter is liable for the highest value of the property between the time of its conversion and a reasonable time after the owner has notice of it. This rule rests upon the theory that the owner, when notified of the conversion, is bound to use reasonable efforts to minimize his damages. He is entitled, therefore, to only a reasonable time within which to replace the property.⁹⁵

233. Damages Against Independent but Concurrent Wrong-Doers. It often happens that the consequences of several independent torts are so mingled that it is quite impossible to measure accurately the damages caused by each. What are the injured person's rights in such cases?

It is certainly unfair to leave him without redress, simply because he cannot disentangle the consequences of the several torts, and trace with exactness each line of causation. Accordingly, if either of the wrongdoers committed his tort in circumstances which would fairly apprise a reasonably careful person that it would cooperate with the tort of another, he is answerable for the entire damage.⁹⁶ Otherwise, the extent of liability will be left "to the good sense of the jury, as reasonable men, to form, from the evidence, the best estimate that can be made under the circumstances" of the damage caused by each wrongdoer.⁹⁷

⁹⁵. *Gallagher v. Jones*, 129 U. S. 193, 9 Sup. Ct. 335, 32 L. Ed. 658 (1888); *Citizens Ry. v. Robbins*, 144 Ind. 671, 42 N. E. 916 (1896); *Diamond v. U. S. Nat. Bk.*, 55 N. J. L. 296, 25 At. 926, 9 Am. St. R. 643 (1893); *Wright v. Bank of Met.*, 110 N. Y. 237, 18 N. E. 79, 6 Am. S. R. 356, 1 L. R. A. 289 (1888); *Morris v. Wood (Tenn.)*, 35 S. W. 1013 (1896); substantially the same rule is laid down by statute in California, North Dakota, and South Dakota. See *Ralston v. Bank of Cal.*, 112 Cal. 208, 44 Pac. 476 (1896); *First Nat. Bank v. Minn., etc., Elec. Co.*, 8 N. D. 430, 79 N. W. 874 (1899); *Golden Reward Co. v. Buxton Co.*, 97 Fed. 413, 38 C. C. A. 228 (1889). See *McIntyre v. Whitney*, 139 App. Div. 557, 124 N. Y. Supp. 234 (1910), *affd. without opinion*, 201 N. Y. 526 (1911), and note thereon, 10 Columbia Law Rev. 754.

⁹⁶. *Byrne v. Wilson*, 15 Ir. C. L. 332 (1862); *Kansas City v. Slangstrom*, 53 Ks. 431, 36 Pac. 706 (1894); *Slater v. Mersereau*, 64 N. Y. 138 (1876); *Memphis Consol. G. & E. Co. v. Creighton*, 183 Fed. 552, 106 C. C. A. 98 (1910); *The Mariska*, 107 Fed. 989 (1901); *Erie Ry. v. Erie & W. T. Co.*, 204 U. S. 220, 27 Sup. Ct. 246 (1907).

⁹⁷. *Jenkins v. Penn. Ry.*, 67 N. J. L. 331, 334, 51 At. 704, 57 L. R. A. 309 (1902); *Ogden v. Lucas*, 48 Ill. 492 (1868); *Washburn v. Gilman*, 64 Me. 163, 18 Am. R. 246 (1873); *Auchmuty v. Ham*, 1 Den. (N. Y.) 495 (1845); *Millard v. Miller*, 39 Colo. 103, 88 Pac. 845 (1907).

234. **Interest as an Element of Damages in Tort Actions.** This topic has received but little attention from the courts until quite recent times. It was assumed, formerly, that interest could be recovered only when the defendant had expressly or impliedly promised to pay it. In 1833, this doctrine was modified by a statute in England, which enacted that the jury might "give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover, or trespass *de bonis asportatis*." ⁹⁸ In no other tort actions is interest recoverable in England. ⁹⁹

235. In this country, the courts and legislatures have virtually discarded the common-law rule, and have adopted the principle "that wherever a claim for damages exists, no matter what the cause of action, if it represents a loss of pecuniary value ascertainable with reasonable certainty, as of a definite time, interest should be recoverable from that time. If the claim is at large and for the discretion of the jury; if it is unliquidated, and involves non-pecuniary elements, such as pain and suffering, it should not be allowed." ¹⁰⁰ Applying this principle, it is generally held in this country, that in actions for personal injury, such as assault and battery, defamation, false imprisonment, seduction, and the like, interest is not allowable as a separate item of damages.¹ In such actions the jury are at liberty to award, as general damages, such sum as will fully compensate the plaintiff for the wrong inflicted. To supplement that with interest, would be "to add damages to damages."² By statute, in a few States, interest is discretionary with the jury in such cases.³

98. Chap. 42, § 29, 3 & 4 W. 4.

99. Mayne, *On Damages* (7th Ed.), pp. 174, 176.

100. Sedgwick, *Elements of Damages*, p. 129; Sedgwick *on Damages* (9th ed.), § 316.

1. *Western, etc., Ry. v. Young*, 81 Ga. 397, 7 S. E. 912 (1888); *Pittsburg, etc., Ry. v. Taylor*, 104 Pa. 306, 49 Am. R. 580 (1883); *Texas, etc., Ry. v. Carr*, 91 Tex. 332, 43 S. W. 18 (1897); *Nichols v. Union Pac. Ry.*, 7 Utah, 570, 27 Pac. 693 (1891); *In Wash. & Geo. Ry. v. Hickey*, 12

App. (D. C.) 269 (1895), interest was held allowable on money expended by reason of a personal injury.

2. *Louisville, etc., Ry. v. Wallace*, 91 Tenn. 35, 17 S. W. 882, 14 L. R. A. 548 (1891).

3. *King v. Southern Pac. Ry.*, 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755 (1895), applying § 3288 of Civil Code; *Ell v. Nor. Pac. Ry.*, 1 N. D. 336, 48 N. W. 222, 12 L. R. A. 97, 26 Am. S. R. 631 (1891), applying § 4578 Comp. Laws.

In actions for the conversion of personal property, as well as of trespass and replevin, where plaintiff's damages are easily ascertainable by reference to fairly fixed and well known values, interest is allowable as a matter of law, from the date of the injury.⁴ In admiralty cases, the rate allowed in this country is six per cent.⁵ In common-law actions, the local rate, at the time and place of the injury, is allowed.⁶ Some courts do not recognize this right to interest as one definitely accorded by law, but as one depending upon the circumstances of each case, and thus determinable by the jury.⁷

A third class of cases, according to the prevailing view, includes injuries to property which do not amount to conversion or destruction. Here the jury, in assessing damages, are "to take into account the lapse of time, and put the plaintiff in as good a position in reference to the injury, as if the damages directly resulting from it had been paid immediately." If the circumstances are such as to show that interest at the legal rate is not necessary to fully compensate the plaintiff, the jury can withhold it.⁸ In some jurisdictions, the power to give interest in this class of cases is denied to the jury.⁹

236. Avoidable Damages. The law does not hold even a willful wrongdoer to liability for all the consequences of his miscon-

4. *St. Louis, etc., Ry. v. Lyman*, 97 Fed. 150, 38 C. C. A. 89 (1889); 57 Ark. 512, 22 S. W. 170 (1893); *Miller v. Express Propeller Line*, 61 Oviatt v. Pond, 29 Conn. 479 (1861); N. Y. 313 (1874).

Ward v. Conn. Pipe Co., 71 Conn. 345, 41 At. 1057, 42 L. R. A. 706, 71 Am. S. R. 207 (1889); *Union Pac. Ry. v. Ray*, 46 Neb. 750, 65 N. W. 773 (1896); *City of Allegheny v. Campbell*, 107 Pa. 530 (1884); *Watkins v. Junker*, 90 Tex. 584, 40 S. W. 11 (1897); *Sherwin v. McKie*, 51 N. Y. 180 (1872).

7. *Eddy v. Lafayette*, 49 Fed. 807, 4 U. S. App. 247 (1892); *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126, 4 N. E. 620 (1886).

8. *Ainsworth v. Lakin*, 180 Mass. 397, 402, 62 N. E. 746 (1902); *Wilson v. City of Troy*, 135 N. Y. 96, 32 N. E. 44, 18 L. R. A. 449, 31 Am. S. R. 817 (1892); *Richards v. Citizens' Nat. Gas Co.*, 130 Pa. 37, 18 At. 600 (1889).

9. *Meyer v. A. & P. Ry.*, 64 Mo. 542 (1877); *New York, etc., Ry. v. Estill*, 147 U. S. 591, 622, 13 Sup. Ct. 444, 37 L. Ed. 305 (1893).

6. *Machette v. Wamless*, 2 Col. 170 (1873); *New Dunderburg Co. v. Old*,

duct. It compels him to answer only for the proximate result. It casts upon the injured party the duty of using reasonable care and effort to minimize his damages. He is not allowed to "stand by and suffer the injury to continue and increase without reasonable efforts to prevent further loss."¹⁰ If A breaks down B's fence, the latter cannot deliberately leave it unrepaired and recover from A the damages caused by cattle which get into his field through the opening. Such damage is too remote. It is the result of B's folly.¹¹ A person, who is unlawfully ejected from a train, or who is wrongfully prevented from boarding it, is bound to act reasonably, although he has been wronged. If, instead of waiting for the next train, or hiring a conveyance, he walks to his destination in extremely cold weather and injures his health, such injury is chargeable to his imprudence and not to the railroad company's misconduct.¹² Had he hired a conveyance, he would have been bound to act prudently in so doing.¹³ In case of personal injury, the victim must exercise reasonable care in mitigating the consequences.¹⁴ He is not bound, however, to engage the services of

10. *Brant v. Gallup*, 111 Ill. 487, Pac. Ry. 52 La. Ann. 1060, 27 So. 53 Am. R. 638 (1888); *Simpson v.* 584 (1900).

Keokuk, 34 Ia. 568 (1872). "If the plaintiffs by the use of ordinary diligence and efforts, and at a moderate expense, might have prevented the damages, by filling in the lots near the alley, it seems to follow that their negligence contributed to the injury."

11. *Loker v. Damon*, 17 Pick. (34 Mass.) 284, 288 (1835). "So if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damages. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture, or pictures, or other valuable articles sustain damage, this damage would be too remote."

12. *Ind. B. & W. Ry. v. Birney*, 71 Ill. 391 (1847); *Bader v. Southern*

13. *LeBlanche v. Lon. & N. W. Ry.*,

1 C. P. D. 286, 45 L. J. C. P. 521

(1876). "The question then is,

whether, according to the ordinary habits of society, a gentleman in the position of the plaintiff, who was going to Scarborough for the purpose of amusement, and who missed his train at York, would take a special train at York to Scarborough at his own cost, in order that he might arrive at Scarborough an hour and a half sooner than he would do if he waited at York for the next train."

14. *Fullerton v. Fordyce*, 144 Mo.

519, 44 S. W. 1053 (1898); *Sullivan*

v. Tloga Ry., 112 N. Y. 643, 20 N.

E. 569, 8 Am. S. R. 793 (1899); *Salla-*

day v. Dodgeville, 85 Wis. 318, 55

N. W. 696, 20 L. R. A. 541 (1893);

O'Donnell v. Rhode Island Co., 28 R.

I. 245, 66 At. 578 (1907).

the most skillful physician;¹⁵ and if he uses ordinary care in employing medical advisers, he is not chargeable with their errors.¹⁶ In the case of willful torts, it has been held that ordinary negligence on the part of the victim will not bar a recovery.¹⁷

237. The Functions of Court and Jury. To the court belongs the power of announcing and explaining the rule of law relating to damages in a particular case, while to the jury belongs the power of determining the facts. If the evidence is undisputed and warrants but one inference, the court may properly direct the jury to find a verdict in accordance with that inference. Accordingly, when a plaintiff, injured by the defendant's negligence, asks damages for loss of time, while confined to his house, but offers no evidence showing the character or extent of such damages, the court should direct the jury to bring in a verdict for nominal damages only.¹⁸ When the evidence is undisputed, it is also a question for the court whether the plaintiff is entitled to exemplary damages or to compensatory damages.¹⁹ And, generally, it is the duty of the court to state the rule which the jury are to apply in fixing the damages in the case before them.²⁰

238. Amount of Damages is Ordinarily for the Jury. While the amount of damages in a particular case is generally left to the discretion of a jury, their power, even here, is not arbitrary. It is subject to considerable supervision by the court. For a time after the institution of trial by jury was established, the answer of a jury to the question of damages appears to have been final,²¹ espec-

15. *Selleck v. Janesville*, 100 Wis. 157, 75 N. W. 975, 41 L. R. A. 563, 90 N. Y. 26 (1882).

69 Am. S. R. 906 (1898).

18. *Leeds v. Met. Gas Light Co.*, 11

16. *McGarrahan v. N. Y., etc., Ry.*, Bush. (74 Ky.) 495, 516 (1876); 171 Mass. 211, 50 N. E. 610 (1898); *Spokane Truck Co. v. Hoefer*, 2 Reed v. Detroit, 108 Mich. 224, 65 Wash. 45; 25 Pac. 1072 (1891); N. W. 967 (1896); *New York, etc., Ward v. Blackwood*, 41 Ark. 295 Co. v. Bennett, 62 N. J. L. 742, 42 (1883); *Goldsmith's Adm'r v. Joy*, At 759 (1899); *Sauter v. N. Y. C. Ry.*, 66 N. Y. 50, 23 Am. R. 18 (1876).

19. *Louisville, etc., Ry. v. Fox*, 11 Md. 135, 17 At. 1052 (1889); *Knight v. Egerton*, 7 Exch. 407 (1852).

17. *Chicago, etc., Co. v. Meech*, 163 Ill. 305, 45 N. E. 290 (1896); *Galveston, etc., Ry. v. Zantzinger*, 92 Tex. 365, 48 S. W. 563, 44 L. R. A. 553, 71 Am. S. R. 859 (1898).

20. *Balt. & Ohio Ry. v. Carr*, 71 Md. 135, 17 At. 1052 (1889); *Knight v. Egerton*, 7 Exch. 407 (1852).

21. *Sedgwick, Elements of Damages*, p. 2; *Sedgwick on Damages* (8th Ed.), § 1316.

ially in cases of trespass to property, where the facts were within the personal knowledge of the jurors;²² or of defamation, where the injury sustained depended much upon the quality of the persons and the local situation.²³ But it is to be borne in mind that "courts existed before juries," and have never "allotted all questions of fact to the jury."²⁴ Accordingly, when the matter of damages depends on a "cause which appears in sight of the court, so that they may judge of it as in mayhem, etc.;"²⁵ or upon undisputed evidence, which shows that if the plaintiff is entitled to recover anything he is entitled to recover a specific sum, or a sum much larger than the jury have awarded, the court has the right to set aside the verdict.²⁶

239. At present, therefore, the jury have not unlimited authority over the assessment of damages. As early as 1695, Lord Holt, in setting aside a verdict for £2,000 damages for false imprisonment, said: "The jury were very shy of giving a reason of their verdict, thinking they have an absolute, despotic power; but I did rectify that mistake, for the jury are to try causes with the assistance of the judges, and ought to give reasons when required, that if they go upon any mistake they may be set right."²⁷ Accordingly,

22. *Delves v. Wyer*, 1 Brownl. 204 (1605); the jury assessed the damages at £40 for cropping 200 pear trees and 100 apple trees, and the court said it could not diminish the "damages in trespass which was local and therefore could not appear to them."

23. *Hawkins v. Sciet, Palmer*, 314 (1622). In this case the court at first reduced the damages from £150 to £50, "but afterwards on great consideration revoked this and resolved to leave such matters to the jury." *Lord Townsend v. Hughes*, 2 Mod. 150 (1677). Verdict for £4,000 was left undisturbed.

24. Thayer, "Law and Fact in Jury Trials," 4 Harv. L. Rev. 147; *Cases on Evidence*, Ch. I, Sec. VI.

25. *Hawkins v. Sciet, Palmer* 314 (1622).

26. *Richards v. Sanford*, 2 E. D. Smith (N. Y.) 349 (1854); verdict for \$10.00 was set aside and new trial ordered, unless defendant would consent to its being raised to \$100.00; *Phillips v. Lon., Etc. Ry.*, 5 C. P. D. 78 (1874); verdict for £7,000 was set aside as inadequate, the evidence showing that the plaintiff as a physician had been earning from £6,000 to £7,000 a year and was incapacitated for life. On a second trial, the verdict was for £16,000, and the court refused to disturb it, as being excessive; *Carter v. Wells, Fargo & Co.*, 64 Fed. 1005 (1894).

27. *Ash v. Lady Ash*, Com. 357; plaintiff was confined two or three hours and forced to take physic.

if the verdict is the result of casting lots, or of any other improper practice;²⁸ or if the jury have refused to apply the measure of damages properly stated to them by the court,²⁹ or if their verdict shows that they adopted an erroneous theory of liability,³⁰ or that their minds were influenced by some improper motives or feelings or bias,³¹ the court has the power and will not hesitate to set the verdict aside, unless the prevailing party assents to its reasonable modification.

240. Damages Not to Be Split Up. The victim of a tort is not allowed to bring a separate suit for each item of damage which results from a single wrongdoing. "It is for the public good that there be an end of litigation," is an ancient and honored maxim of the common law.³² Accordingly, in a suit for personal injuries, the plaintiff not only may claim prospective damages, in addition to those already developed, but must claim them then, if he would recover them at all.³³ So, if the action is brought for injury to property, the plaintiff must unite all the items of damage both present and prospective.³⁴

Thus far, there is no difference of opinion and no difficulty. But suppose a single tortious act of the defendant invades distinct

28. *Mellish v. Arnold*, Bunb. 51 brought but held not to lie; *Hodsoll* (1719); verdict set aside because v. *Stallebrass*, 11 Ad. & E. 301, 3 P. "jury threw up cross or pile for & D. 200, 9 C. & P. 63 (1839); *Fox* £300 or £500." *Falvey v. Stanford*, v. *St. John*, 23 New Brunz, 244 L. R. 10 Q. B. 54, 44 L. J. Q. B. 7 (1883); *Stodghill v. Chic., Etc. Ry.*, (1874). 53 Ia. 341; 5 N. W. 495 (1880);

29. *Limburg v. Germ. Fire Ins. Co.*, 90 Ia. 709; 57 N. W. 626 (1894). *Howell v. Goodrich*, 69 Ill. 556 (1873); *Richmond Gas Co. v. Baker*,

30. *Louisville, Etc. Ry. v. Minogue*, 146 Ind. 600; 45 N. E. 1049, 36 L. 90 Ky. 369, 14 S. W. 357 (1890); *R. A.* 683 (1897); *Kansas, Etc. Ry. v. Moseley*, 68 Miss. 336 (1890). *Church v. Ottawa*, 25 Ont. *v. Muhlman*, 17 Ks. 224 (1876); *Thompson v. Ellsworth*, 39 Mich. 719 (1878); *Warner v. Bacon*, 8 Gray, H. 298 (1894).

31. *Thurston v. Martin*, 5 Mason (U. S.), 497 (1830). (74 Mass.) 397 (1857); *Filler v. N. Y. C. Ry.*, 49 N. Y. 42 (1872); *Good-*

32. *Wichita, Etc. Ry. v. Beebe*, 39 *hart v. Penn. Ry.*, 177 Pa. 1; 35 At. Ks. 465, 18 Pac. 502 (1888). 191 (1896); *Whitney v. Clarendon*,

33. *Fetter v. Veal*, 1 Salk. 11, 12 18 Vt. 252 (1846). *Mod.* 542, 1 Ld. Raymond, 339; **34.** *Wheeler Savings Bank v. Tracy*, 141 Mo. 252, 42 S. W. 446; (1703); recovery had been had for 64 Am. S. R. 505 (1897), and cases assault and battery. Upon reopen- ing of wound, second action was cited in preceding note.

legal rights of the plaintiff,—does the common-law maxim apply? Is the plaintiff bound to bring a single action for all the damages suffered? The answers are discordant. In England, and in some of our jurisdictions, the courts declare that the single act may result in more than one tort. If it causes harm to the plaintiff's person and also to his property, he has two causes of action, although the several injuries are inflicted at the same moment. His right to personal security, it is said, is wholly distinct from his right of property,³⁵ and "the essential difference between an injury to the person and an injury to property makes it impracticable, or at least very inconvenient in the administration of justice, to blend two."³⁶

This view seems to the writer correct. It must be admitted, however, that the weight of judicial decision and *dicta* in this country is opposed to it. According to these authorities, "the cause of action consists of the wrongful act which produced the effect, rather than in the effect of the act in its application to different primary rights; and the injury to the person and property, as a result of the original cause, gives rise to different items of damage."³⁷

85. *Brunsdon v. Humphrey*, 14 Q. L. 661, 80 At. 495 (1911), reversing B. D. 141, 53 L. J. Q. B. 476, 51 L. 80 N. J. L. 148, 77 At. 583 (1910). T. R. 529, 31 A. L. J. 329 (1884); 87. *King v. Chic., Etc. Ry.*, 80 Watson v. Tex., Etc. Ry., 8 Tex. C. Minn. 83, 82 N. W. 1113, 81 Am. S. App. 144, 27 S W. 924 (1894). R. 238, 50 L. R. A. 161, with note

86. *Reilly v. Sicilian Asphalt Co.*, 170 N. Y. 40, 62 N. E. 772, 88 Am. Conn. 295 (1853). Cf. *Boerum v. S. R.* 636, 57 L. R. A. 176 (1902). Taylor, 19 Conn. 122 (1848), holding that plaintiff had two distinct causes of action against defendant for putting poison in rum; one for spoiling the rum, and another for injury to the plaintiff from drinking the rum; *Doran v. Cohen*, 147 Mass. 342, 17 N. E. 647 (1888); *Hatchell v. Kimbrough*, 4 Jones L. (N. C.) 163 (1856); *Cox v. Crumley*, 5 Lea (Tenn.), 529 (1880); *Hazard Powder Co. v. Volger*, 3 Wyo. 189, 18 Pac. 636 (1888).
In this case, stress was laid upon the fact that different periods of limitation apply to the two injuries; that the right of action for injury to property is assignable and that for injury to person is not; that the former is seizable by creditors and would pass to an assignee in bankruptcy, while the latter is not seizable and would not pass. This decision overruled S. C. in 31 App. Div. 302, 52 N. Y. Supp. 817 (1898); *Ochs v. Public Service Ry.*, 81 N. J.

§ 4. LOCAL ACTIONS FOR TORT.

241. Early Law: Modern Doctrine. Originally, all actions at common law were local, because the issue of fact in every common-law action was to be tried by a jury of the vicinage. This rule was modified by degrees, until the modern doctrine was established, "that actions are deemed transitory when the transactions on which they are founded might have taken place anywhere; but are local when their cause is in its nature necessarily local."³⁸ The most common example of a local action for tort is that of trespass to land. As this tort can occur only in the country where the land is situated, the action must be brought there. The court of no other country has jurisdiction of the cause of action. Although it is admitted that this doctrine is highly technical, and, at times, works a hardship to the injured party, it is still maintained in England and in most of our States.³⁹

Applying this doctrine, it has been held that an action for cutting and tapping trees is local, but one for slander of title to the land on which the trees stood is transitory.⁴⁰ An action for the conversion of timber which has been cut, or of oysters which have been taken "from their beds," is transitory.⁴¹ It has been held that an action for damages caused by a nuisance may be brought in the jurisdiction where it is situated, although the damages are inflicted in a different jurisdiction.⁴² If, however, the action is for injury to the land, the suit is to be brought there, although the act causing the injury, such as the diversion of a stream, takes place in another state.⁴³

³⁸. *Livingston v. Jefferson*, 1 (1895); *Niles v. Howe*, 57 Vt. 388 Brock. (U. S. C. C.) 203, 209 (1811). (1885).

³⁹. *Doulson v. Matthews*, 4 D. & 40. *Dodge v. Colby*, 108 N. Y. 445, E. 503 (1792); *British South Africa* 15 N. E. 703 (1888).

Co. v. Companhia de Mocambique 41. *Makely v. A. Boothe Co.*, 129 (1893), A. C. 602, 63 L. J. Q. B. 70, N. C. 11, 39 S. E. 582 (1901).

69 L. T. 604; *Allin v. Conn. Ry. Co.*, 42. *Rundle v. Del. & Raritan C. Co.*, 1 Wall. Jr. (U. S. C. C.) 275 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416 (1890); *Watts v. Kinney*, 23 (1849).

Wend. (N. Y.) 485, 6 Hill, 82 (1840); 43. *Thayer v. Brooks*, 17 Ohio, 489, *Cragin v. Lovell*, 88 N. Y. 258 (1882); 49 Am. Dec. 474 (1848); *Railway Ellenwood v. Marletta Co.*, 158 U. S. *Company v. Jackson*, 83 Oh. St. 13, 105, 15 Sup. Ct. 771, 39 L. Ed. 913 93 N. E. 260 (1910).

§ 5. CONFLICT OF LAWS IN TRANSITORY ACTIONS.

242. **What Actions Are Transitory.** For torts of a personal character, the victim is not limited to a local action. His right to a remedy is transitory, accompanying him into other "venues" of the same country, and oftentimes into foreign jurisdictions.⁴⁴ In case he seeks redress in another country from that in which the injury was inflicted, various questions in the conflict of laws may arise. We shall not be able to discuss these questions with fullness in this connection, but must be content with stating the leading principles applicable to such cases, referring the reader to treatises upon the conflict of laws, for more detailed information.

243. **A Tort by Lex Loci and Lex Fori.** When the wrong complained of is an actionable tort by the law of both jurisdictions, the suit will be sustained by any competent tribunal which has obtained jurisdiction of the defendant's person. This rule has been adopted as a matter of international comity and with a view to promote justice.⁴⁵ In this class of cases, the only question of difficulty relates to the measure of damages. Upon principle it would seem that this is determinable by the law of the place where the injury is done;⁴⁶ unless the *lex fori* limits the recovery to a fixed sum.⁴⁷

244. **Injury Which Is Not Tortious by the Lex Loci.** If the act complained of was not wrongful by the law of the place where it occurred, it will not be actionable in any other jurisdiction, although had the act occurred in the latter country it would have constituted a tort.⁴⁸ "If no cause or right of action for which

44. In *Rafael v. Verelst*, 2 W. Bl. 1417, 27 So. 851, 50 L. R. A. 816 1055, 1058 (1776), De Gray, C. J., (1900); *Morisette v. Canadian Pac. Ry.*, 76 Vt. 267, 56 At. 1102 (1904).
45. *Pullman Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53 (1897). But see *Carson v. Smith*, 133 Mo. 606, 34 S. W. 855 (1896).
46. *Wooden v. Western, Etc. Ry.*, 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. R. 803 (1891).
47. *Carter v. Goode*, 50 Ark. 155, 6 S. W. 719 (1887); shooting a trespassing mule was not a tort in the

48. *Mexican Nat. Ry. v. Jackson*, 89 Tex. 107, 33 S. W. 857, 31 L. R. A. 276, 59 Am. St. R. 28 (1896); *Williams v. Pope Mfg. Co.*, 52 La. Ann.

redress may be had exists in the country where the personal injury was received, then there is no cause of action to travel with the person claimed to be in fault, which may be enforced in the State where he may be found.”⁴⁹

In England, however, it is held that if the act is wrongful by the *lex loci*, although not remedial in a civil action *ex delicto*, but only by a criminal proceeding, it will support a tort action, if it amounts to a tort by the *lex fori*. This decision proceeds upon the theory that to support a tort action in England for an act committed abroad, two conditions must concur: First, the act must have been of such a character that it would have been actionable if it had been committed in England. Second, it must not have been justifiable by the law of the place where it was done.⁵⁰

It is to be noted that if the plaintiff brings his action for a common-law tort, he need not allege that the wrong is actionable under the statutes or laws of the State where the wrong was inflicted. The common-law rule will be presumed to obtain there,⁵¹ if the legal system is based upon the common law. While, if he sues for a statutory tort, he must allege and prove the statute.⁵²

245. Injury Which Is Not Tortious by the Lex Fori. The English courts refuse to entertain a suit for the redress of such an

Indian Territory, under the circumstances, *Le Forest v. Tolman*, 117 Mass. 109, 19 Am. R. 400 (1875); action in Massachusetts, under statute of that State, for injury done by a dog in New Hampshire, where no such statute was shown to exist, and the common law did not give the right of action. (Such statute does now exist in New Hampshire, *Chickering v. Lord*, 67 N. H. 555, 32 Atl. 773 (1893), applying Pub. St., ch. 118, § 10); *Smith v. Condry*, 1 How. (U. S.) 28 (1843); *Beacham v. Portsmouth Bridge*, 68 N. H. 382, 40 Atl. 1066 (1896); *Phillips v. Eyre*, L. R. 6 Q. B. 1, 40 L. J. Q. B. 28 (1870).

49. *McLeod v. Conn. Etc. Ry.*, 58 Vt. 727, 6 Atl. 648 (1886); *Cuba Railroad Co. v. Crosby*, 222 U. S. 473, 32

Sup. Ct. 132 (1912), rev'g 170 Fed. 369, 95 C. C. A. 539 (1909), "With rare exceptions, the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it."

50. *Machado v. Fontes* (1897), 2 Q. B. 231. See *Evey v. Mex. C. Ry.*, 52 U. S. App. 118, 81 Fed. 294, 38 L. R. A. 387 (1897).

51. *Whitford v. Panama Ry. Co.*, 23 N. Y. 465, 468 (1861); *Ill. Cent. Ry. Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. 202 (1901).

52. *Kahl v. Memphis, Etc. Ry.*, 95 Ala. 337, 10 So. 661 (1891); *Le Forest v. Tolman*, 117 Mass. 109, 19 Am. R. 400 (1875).

injury.⁵³ In this country, however, it may be prosecuted, unless its primary object is the enforcement of a penal statute, or unless it is deemed by the courts repugnant to justice or to good morals, or calculated to injure the State where the action is brought, or its citizens.⁵⁴ This rule has been most frequently applied in suits for wrongful death. Such actions did not lie at common law. For a time after the enactment of statutes, following Lord Campbell's Act in England,⁵⁵ courts of States, where the common law had not been changed, were disposed to exclude suitors whose cause of action arose under a statute of this sort.⁵⁶ At present, however, the tendency is to view these statutes as remedial—as “simply taking away a common-law obstacle to recovery for an admitted tort”—and to permit suits for such torts to be brought in any jurisdiction.⁵⁷

246. Defenses Generally Depend Upon the Lex Loci. This rule follows logically from the principles stated above. A cause of

53. *The Halley* L. R., 2 P. C. 193, 24 Sup. Ct. 581 (1904). See dissenting opinion of Fuller, C. J.

54. *Higgins v. Cent. Etc. Ry.*, 155 Mass. 176, 29 N. E. 534, 31 Am. S. R. 544 (1892), distinguishing *Richardson v. N. Y. C. Ry.*, 98 Mass. 85 (1867), and *Davis v. N. Y. & N. E. Ry.*, 143 Mass. 301, 58 Am. R. 138 (1887), the latter dealing with a penal statute of Conn.; *Wooden v. Western, Etc. Ry.*, 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. S. R. 803 (1891); *Williams v. Pope Mfg. Co.*, 52 La. Ann. 1417, 27 So. 851 (1900); *Herrick v. Minn., Etc. Ry.*, 31 Minn. 11, 16 N. W. 413, 47 Am. R. 771 (1883); *Chicago, Etc. Ry. v. Doyle*, 60 Miss. 977 (1883); *Knight v. West Jersey Ry.*, 108 Pa. 250, 56 Am. R. 200 (1885); *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123 (1892); *Mexican Nat. Ry. v. Slater*, 115 Fed. 593, 53 C. C. App. 239 (1902), *aff'd* 194 U. S. 120,

55. *Infra*, ch. VI.

56. *Richardson v. N. Y. C. Ry.*, 98 Mass. 85 (1867); *Taylor v. Penn. Co.*, 78 Ky. 348, 39 Am. R. 244 (1880); *Woodward v. Mich. So. Ry.*, 10 Oh. St. 121 (1859).

57. *Dennick v. Central Ry.*, 103 U. S. 11, 26 L. Ed. 439 (1880); *Stewart v. B. & O. Ry.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537 (1897); *Bruce v. Cin. Ry.*, 83 Ky. 174 (1885); *Louisville & N. Ry. v. Whitlow*, 105 Ky. 1, 43 S. W. 711, 41 L. R. A. 614 (1898). In Pennsylvania it is held that an action for damages for injuries causing death, being entirely statutory, must be brought by the person to whom the right is given by the statutes of the State where the cause of action arose. *Hoodmacher v. Lehigh Valley Ry.*, 218 Pa. 21, 66 At. 975 (1907), following *Usher v. West Jersey R. R. Co.*, 126 Pa. 206, 17 At. 597, 4 L. R. A. 261, 12 Am. St. Rep. 863 (1889).

action may have come into existence, but may have been destroyed by subsequent legislation in the place where it arose;⁵⁸ or by the operation of well-established rules of law, as in case of the death of the person to whom it belonged.⁵⁹ A vested right of defense, it is declared, is a property right, and available to its owner wherever he may be sued.⁶⁰ Accordingly, whether the defendant was negligent in a particular situation, and whether the plaintiff was guilty of contributory negligence;⁶¹ whether plaintiff had assumed the risk of the peril which resulted in his injury;⁶² whether the negligent actor was plaintiff's fellow-servant,⁶³ and similar questions, are to be answered by the law of the place where the injury was inflicted.

§ 6. INDEMNITY BETWEEN WRONGDOERS.

247. If Free from Fault. We have seen that a master or principal, who has been compelled to pay damages to a third person, because of his servant's or agent's misconduct, is entitled to indemnity from his wrongdoing representative, if he is himself free from actual fault.⁶⁴ Accordingly, if a railroad company is forced to pay a passenger for a trunk, lost through the negligence of one of its baggage masters, it is "entitled to reimbursement at the hands

⁵⁸. *Phillips v. Eyre*, L. R. 6 Q. B. (1896); *Bal. & O. Ry. v. Reed*, 158 1, 40 L. J. Q. B. 28 (1870). Cf. *Sawyer v. Davis*, 136 Mass. 239 (1884). ⁶¹. *Louisville & N. Ry. v. Harmon*

⁵⁹. *Higgins v. Cent. Ry. of N. E.*, (Ky.), 64 S. W. 640 (1901); *Bridger v. Ashville Ry.*; 27 S. C. 456, 3 S. E. S. R. 544 (1892); *O'Reilly v. N. Y.*, 860, 13 Am. S. R. 653 (1886).

Etc. Ry., 16 R. I. 388, 17 At. 171, 906, 19 At. 244, 5 L. R. A. 364, 6 L. R. A. 719 (1899); "after a cause of ⁶². *Northern Pac. Ry. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958 (1894).

action has become extinct where it accrued, it cannot survive elsewhere;" and the law of the place where it accrues determines whether it survives or is assignable, or not. ⁶³. *Baltimore & O. Ry. v. Reed*, 158 Ind. 25, 62 N. E. 488 (1902); *Turner v. St. Clair Tunnel Co.*, 111 Mich. 578, 70 N. W. 146, 36 L. R. A. 134, 66 Am. S. R. 397 (1897); *Rick v. Saginaw Co.*, 132 Mich. 237, 93 N. W. 632 (1903); *Ill. Cen. Ry. v. Harris*

⁶⁰. *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104 (1882); *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215 (1891). ⁶⁴. *Supra*, ¶ 208.

of the baggage master for the amount which it had paid out.”⁶⁵ This principle applies to all cases where one person is liable in tort, as a constructive wrongdoer only, for the actual tortious misconduct of another. The fact that they are technically joint tort-feasors does not prevent the morally innocent one from obtaining indemnity from the actual wrongdoer.⁶⁶

248. Indemnity to Agent or Servant. This principle operates, at times, to secure the agent or servant indemnity from his master or principal. “Every man, who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify him for all such acts as would be lawful, if the employer had the authority he pretends to have.”⁶⁷ The principle has been invoked to secure indemnity, where the plaintiff has been led, by the defendant’s misrepresentation of facts, to believe that a course of action was lawful, where it was in truth unlawful.⁶⁸

249. If Not Free from Blame. Cases of the kind last referred to can rarely occur, for there can be no “valid claim to indemnity where the doer of the act which constitutes the offense has done it

⁶⁵. *Georgia So. Ry. v. Jossey*, 105 Ga. 271, 31 S. E. 179 (1898).

⁶⁶. *Chesapeake & O. Co. v. County Comm’rs*, 57 Md. 201, 40 Am. R. 430 (1881); *Boston v. Worthington*, 10 Gray (76 Mass.) 496, 71 Am. Dec. 678 (1858); *Westfield v. Mayo*, 122 Mass. 100, 23 Am. R. 292 (1877); *Boston & M. Ry. v. Sargeant*, 70 N. H. 299, 47 At. 605 (1900); *S. C. again* in 72 N. H. 455, 57 At. 688 (1904); *Boston & M. Ry. v. Brackett*, 71 N. H. 494, 53 At. 304 (1902); “It is only when the party who is in fault as to the person injured is without fault as to the party whose actual negligence is the cause of the injury, that recovery over can be had,” *Brooklyn v. Brooklyn, Etc. Ry.*, 47 N. Y. 475, 7 Am. R. 469 (1872); *Gulf, Etc. Ry. v. Galveston, Etc. Ry.*, 83 Tex. 509, 18 S. W. 956 (1892); *City of San Antonio v. Smith*, 94 Tex. 266, 59 S. W. 1109 (1900); *Culmer v. Wilson*, 13 Utah, 129, 44 Pac. 833, 57 Am. S. R. 713 (1896).

⁶⁷. *Best, J.*, in *Adamson v. Jarvis*, 4 Bing. 66, 72, 29 R. R. 503, 12 Moore, 241 (1827). In this case, the plaintiff, an auctioneer, to whom defendant had delivered cattle for sale, was obliged to pay to their true owner for their conversion £1,100 damages, £95 costs, and to pay £500 for his own expenses in the action. He sued for and recovered these sums as damages; *Moore v. Appleton*, 26 Ala. 633 (1855).

⁶⁸. *Burrows v. Rhodes* (1897), 1 Q. B. 816, 68 L. J. Q. B. 545. Plaintiff claimed £3,000 damages for being induced to take part in the Jameson raid into the South African Republic. Cf. *Simpson v. Mercer*, 144 Mass. 413, 11 N. E. 720 (1887).

with knowledge of all the circumstances necessary to constitute the act an offense, but in ignorance that the act done under those circumstances constituted an offense. A man is presumed to know the law."⁶⁹ *A fortiori*, whenever the plaintiff has intentionally committed a tort in connection with or for the benefit of another, the courts will not entertain an action in his behalf for indemnity against the other, but leave him where his wrongful act places him.⁷⁰

§ 7. CONTRIBUTION BETWEEN WRONGDOERS.

250. When Wrong-Doing Is Intentional. This is never allowed wherever the plaintiff's wrongdoing was deliberate and intentional. One who intends to violate the law, or even to do an act, which the law conclusively presumes that he knew was wrongful, will be left where his act places him. Towards him the law imposes no obligation of contribution upon his fellow tort-feasor.⁷¹

251. Where No Wrongful Intent. It often happens, however, that persons join in performing an act which they honestly believe to be lawful, but which turns out to be an invasion of the rights of some third party, who sues one of the tort-feasors to judgment and collects the entire damages from him. In this country, there is no doubt that he is entitled to contribution from those who joined him in the wrongdoing.⁷² The same rule applies between negligent,

⁶⁹. Kennedy, J., in last cited English case. See comments on this case in 15 Law Quar. Rev. 236. Cf. *Cumston v. Lambert*, 18 Ohio, 81, 51 Am. Dec. 442 (1849); 18 Ohio, 81, 51 Am. Dec. 442 (1849); *Boyer v. Bolender*, 129 Pa. 324, 18 At. 127, 14 Am. S. R. 723 (1889); *Spalding v. Oakes*, 42 Vt. 343 (1869); plaintiff and defendant were joint

⁷⁰. *Nelson v. Cook*, 17 Ill. 443 (1856); *Culmer v. Wilson*, 13 Utah, 129, 44 Pac. 833, 57 Am. St. R. 713 (1896); owners of a vicious animal. See Laws of Mich., 1911, ch. 233, making joint libellers liable to contribution.

⁷¹. *Upton v. Times-Democrat*, 104 La. 141, 143, 28 So. 970, 971 (1900); *Becker v. Farwell*, 25 Ill. App. 432 (1887); *Sutton v. Morris*, 102 Ky. 613, 44 S. W. 127 (1898); *Johnson v. Torpy*, 35 Neb. 604, 53 N. W. 575, 37 Am. S. R. 447 (1892); *Torpy v. Johnson*, 43 Neb. 882, 62 N. W. 253, 61 Am. S. R. 267; *Cumston v. Lambert*, 12 So. 473, 19 L. R. A. 628 (1893); S. C. again, 107 Ala. 547, 19 So. 180, 54 Am. S. R. 118 (1895); *Bailey v. Bussing*, 28 Conn. 455 (1859); *Farwell v. Becker*, 129 Ill. 261, 21 N. E. 792, 16 Am. S. R. 267, 6 L. R. A. 400 (1889); *Ankeny v. Moffet*, 37 Minn. 109, 33 N. W. 320 (1887); *Achison v. Miller*, 2 Ohio St. 203, 59 Am. Dec.

as distinguished from willful, tort-feasors.⁷³ Such is the rule in Scotland.⁷⁴ Torts of the kind involved in these cases are, as we have seen,⁷⁵ known as *quasi delicts* in Scotch law, and are sharply distinguished from delicts, or intentional torts. In England it is not clear whether the right of contribution exists in this class of torts. The rule laid down in the leading case of *Merriweather v. Nixon*,⁷⁶ seems to negative the right, as does a recent case in the Probate Division.⁷⁷ The views of text writers upon this point are not in accord.⁷⁸

663 (1855); *Bartle v. Nutt*, 4 Pet. (U. S.) 184, 7 L. Ed. 825 (1830). Cf. *Union Stockyards v. Chicago, B. & Q. Ry.*, 196 U. S. 217, 25 Sup. Ct. 226 (1905).

73. *Nickerson v. Wheeler*, 118 Mass. 295 (1875); *Ankeny v. Moffet*, 37 Minn. 109, 33 N. W. 320 (1887); *Armstrong Co. v. Clarion Co.*, 66 Pa. 218, 5 Am. R. 368 (1870). But see *Weidman v. Sibley*, 16 App. Div. 616, 619, 44 N. Y. Supp. 1097 (1897).

74. *Palmer v. Wick, etc. Co.* (1894), A. C. 318, 71 L. T. 163, 6 R. 245.

75. *Supra*, Chap. I.

76. 8 D. & E. 186, 16 R. R. 810 (1799). See criticism of this case in 17 Law Quar. Rev. 293.

77. *The Englishman and the Australia* (1895), P. 212, 64 L. J. P. 74.

78. *Pollock on Torts* (6th Ed.), pp. 196, 197: "A negligent wrong-doer has no claim to contribution or indemnity," but the author thinks such claim should be allowed between per-

sons undertaking in concert to abate an obstruction to a supposed highway, but who find themselves adjudged to be trespassers. He adds: "I cannot find, however, that any decision has been given on facts of this kind." Clerk & Lindsell on Torts (2d Ed.), p. 56n; "It is submitted that the view (in *The Englishman and the Australia* (1895), P. 212) cannot be supported." These writers seem to treat *Palmer v. Wick, etc. Co.* (1894), A. C. 318, as establishing a rule for England, as well as announcing a rule of Scotch law. *Salmond's Summary of the Law of Torts*, 56, argues for the right of contribution, as stated in the text. In *Paddock-Hawley Iron Co. v. Rice*, 179 Mo. 480, 78 S. W. 634 (1904), it is held that contribution is allowed only between wrong-doers who have acted in concert. For right of contribution in Admiralty, see *Erie Railway v. Erie & Western T. Co.*, 204 U. S. 220, 27 Sup. Ct. 246 (1907).

CHAPTER VI.**DISCHARGE OF TORTS.****§ 1. TWO SPECIES OF DISCHARGE.**

252. By Act of Parties. A cause of action for a tort may be discharged either by the act of the parties, or by the operation of law. The most frequent examples of the first species of discharge are afforded by contracts between the parties, by waiver on the part of the injured person or by satisfaction of judgment on the part of the wrongdoer. The principal examples of the second species of discharge are connected with the death of one of the parties, or with the statute of limitations.

253. Discharge by Contract. To a considerable extent, the law permits parties to contract in advance, that certain conduct by one causing harm to the other, shall not be an actionable tort, although, but for the contract, the law would treat it as such. Thus, by contract with the shipper, a common carrier may relieve himself from tort liability for the loss of freight by accidental fire.¹ And we have seen, in a former connection, that a servant may contract to take the risk of employment, which the law does not cast upon him, as well as exempt the master from duties of care which are imposed by common law.² On the other hand, parties are not absolutely free to contract for exemption from tort liability. In the case of servants, we have seen that legislation has limited very much the freedom of contract for the master's exemption.³ And in

1. *Constable v. Nat. Steamship Co.*, 36 U. S. App. 152, 17 C. C. A. 62 154 U. S. 51, 14 Sup. Ct. 1032, 38 L. (1895).

Ed. 903 (1894); *Davis v. Cent. Vt. Ry.*, 66 Vt. 290, 29 At. 313, 44 Am. S. R. 852 (1893). Cf. *Stephens v. So. Ry.*, 66 Vt. 290, 29 At. 313, 44 Am. S. R. 852 (1893). *2. Supra*, Chap. IV. *Fulton, Etc. Ry.*, 66 Vt. 290, 29 At. 313, 44 Am. S. R. 852 (1893). *3. Mills v. Wilson*, 89 Ga. 318, 15 S. E. 322 (1892); *New v. Southern Ry.*, 116 Ga. 147, 42 S. E. 391 (1902); *Pittsburg. Pac. Co.*, 109 Cal. 86, 41 Pac. 783, 50 Am. S. R. 17, 29 L. R. A. 751 (1895); *Etc. Ry. v. Mahoney*, 148 Ind. 196, 47 N. E. 464, 40 L. R. A. 101, 62 Am. S. R. 503 (1897).

Hartford Fire Ins. Co. v. Chic., M., Etc. Ry., 70 Fed. 201, 30 L. R. A. 193, v. *Peavey*, 29 Kan. 169, 44 Am. R. 630 (1883). *3. Supra*, Chap. IV. *Kansas, Etc. Ry.*

the case of carriers, considerations of public policy have led most courts to pronounce invalid most contracts exempting them from liability for their own negligence.⁴ Similar considerations have induced decisions annulling other contracts for exemption from the defendant's own negligence, or of those for whom he is personally responsible.⁵ Even when contracts exempting tort-feasors from liability are valid, the tendency of the courts is to construe them strictly, and to put upon the wrongdoer the burden of showing that his tort comes within the contract provisions.⁶

254. Agreement Subsequent to the Tort. After a cause of action has accrued to a person, he is not bound to enforce it. Subject to the rights of his creditors, or of those having a legal interest in his claim, he is free to settle it upon such terms as suit him.⁷ If he is capable of binding himself by contract,⁸ he may discharge the wrongdoer from tort liability by an agreement upon a valuable consideration, provided it is free from fraud or undue influence.⁹ Even a voidable agreement may be validated by his subsequent

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| <p>4. Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627 (1873); The New England, 110 Fed. 415 (1901); Louisville & N. Ry. v. Grant, 99 Ala. 325, 13 So. 599 (1892); Welch v. Boston & A. Ry., 41 Conn. 333 (1874); Candee v. N. Y. & H. Ry., 73 Conn. 667, 49 At. 17 (1901); Wabash Ry. v. Brown, 152 Ill. 484, 39 N. E. 273 (1894); Adams Ex. Co. v. Harris, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214, 16 Am. S. R. 315 (1889); Louisville & N. Ry. v. Owen, 93 Ky. 201, 19 S. W. 590, 7 L. R. A. 214 (1892); Atchison, Etc. Ry. v. Lawler, 40 Neb. 356, 58 N. W. 968 (1894); Willock v. Penn. Ry., 166 Pa. 184, 30 At. 948, 45 Am. S. R. 674, 27 L. R. A. 228 (1895); Missouri Pac. v. Ivy, 71 Tex. 409, 9 S. W. 346, 10 Am. S. R. 758, 1 L. R. A. 500 (1888).</p> <p>5. Railway Co. v. Spangler, 44 Ohio St. 471, 8 N. E. 467, 58 Am. R. 833 (1886); Johnson's Adm'x v. Richmond, Etc. Ry., 86 Va. 975, 11 S. E. 829 (1890).</p> | <p>6. St. Louis, Etc. Ry. v. Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. S. R. 104 (1887); Wabash, Etc. Ry. v. Brown, 152 Ill. 484, 39 N. E. 273 (1894); Adams Ex. Co. v. Harris, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214, 16 Am. S. R. 315 (1889); Baltimore & O. Ry. v. Brady, 32 Md. 333 (1868); Brewer v. New York, Etc. Ry., 124 N. Y. 59, 26 N. E. 324, 21 Am. S. R. 647, 11 L. R. A. 483 (1891); Jennings v. Grand Trunk Ry., 127 N. Y. 438, 28 N. E. 394 (1891).</p> <p>7. Shaw v. Chic., Etc. Ry., 82 Ia. 199, 47 N. W. 1004 (1891).</p> <p>8. Gibson v. Western N. Y. Ry., 164 Pa. 142, 30 At. 308, 33 Am. S. R. 586 (1894); Missouri Pac. Ry. v. Brazzil, 72 Tex. 233, 10 S. W. 403 (1888).</p> <p>9. Pederson v. Seattle, Etc. Ry., 6 Wash. 202, 33 Pac. 351, 34 Pac. 665 (1893); Bussian v. Mil., Etc. Ry., 56 Wis. 325 (1882); Albrecht v. Mil., Etc. Ry., 94 Wis. 397, 69 N. W. 63 (1896).</p> |
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ratification.¹⁰ Hence, a wrongdoer may successfully plead in bar of an action for the tort, a compromise,¹¹ or an accord and satisfaction,¹² provided the latter has been executed.¹³

At common law a release under seal, if free from fraud, operates to discharge a cause of action for which it is given and received,¹⁴ even though not based on a valuable consideration.¹⁵ In some of our States, however, a "seal imports a consideration, and is *prima facie* evidence of it; but the validity of the instrument may be impeached for want of consideration."¹⁶

255. A Covenant Not to Sue a tortfeasor has a different legal effect from a release under seal. The latter discharges the cause of action; and if there are two or more joint tort-feasors, an unqualified release to one operates as satisfaction of the releasor's claim against each;^{16a} while the former does not discharge the cause of action. "A covenant not to sue a sole tort-feasor is, to avoid circuitry of action, considered a bar to a suit against such tort-feasor." But where there are joint wrongdoers, the covenant is not a bar even in favor of the covenantee, who must resort to his suit for breach of covenant; and clearly the other wrongdoers cannot invoke the covenant as a bar to an action against them.¹⁷

10. *Drohan v. Lake Shore, Etc. Ry.*, (1887); *Hosler v. Hursh*, 151 Pa. 415, 162 Mass. 435, 38 N. E. 1116 (1894). **25 At. 52** (1892):

11. *Shaw v. Chic., Etc. Ry.*, 82 Ia. 199, 47 N. W. 1004 (1891); *Flegal v. Hoover*, 156 Pa. 276, 27 At. 162 (1893). **14.** *Papke v. Hammond Co.*, 192 Ill. 631, 61 N. E. 910 (1901); *Spitze v. Baltimore & O. Ry.*, 75 Md. 162, 23 At. 307, 32 Am. S. R. 378 (1892); *Flynn*

12. *Boosey v. Wood*, 3 H. & C. 483, 34 L. J. Ex. 65 (1865); the plaintiff and defendant agreed to accept the publication of mutual apologies in satisfaction and discharge of plaintiff's cause of action against defendant for libel, and such apologies were published. This executed agreement was held a bar to an action for libel; *Oli-ver v. Phelps*, 20 N. J. L. 180 (1843); *Guldaker v. Rockwell*, 14 Col. 459, 24 Pac. 556 (1890). **15.** *Phillips v. Cloggett*, 11 M. & W. 84, 12 L. J. Ex. 275 (1843); *Waln v. Waln*, 53 N. J. L. 429, 22 At. 203 (1891), S. C., 58 N. J. L. 640 (1896). **16.** *Hobbs v. Electric Light Co.*, 75 Mich. 550, 42 N. W. 965 (1889); *Torrey v. Black*, 58 N. Y. 185 (1874). **16a.** *Contra, Kropidowski v. Pfister & Vogel L. Co.*, 149 Wis. 421, 135 N. W. 839 (1912), 12 Columbia Law

13. *Ogilvie v. Hallan*, 58 Ia. 714, 12 N. W. 730 (1882); *Burgess v. Deni-son Paper Co.*, 79 Me. 266, 9 At. 726 **17.** *Duck v. Mayeu* (1892), 2 Q. B. 511, 62 L. J. Q. B. 69; *City of Chic.*

256. Discharge by Waiver. In a former chapter,¹⁸ attention was called to the right, accorded in certain cases to the victim of a tort, to sue the wrongdoer in a contract action. As this remedy is not concurrent with that which he is entitled to seek in an action *ex delicto*, his final election to pursue it operates to discharge his claim in tort against the same defendant. Indeed, as was pointed out in the former chapter, some courts hold that this election of remedies discharges the tort *in toto*.¹⁹ But the better view is that the election "is not strictly a waiver of the tort, for the tort is the only basis of the contract action." It is a waiver of the damages for the tort and a suing for the value of the property wrongfully taken by the defendant. "It is simply an election between remedies for an act done, leaving the rights of the injured party against the wrongdoer unimpaired until he has obtained satisfaction."²⁰

The victim of a tort does not make a final election to limit himself to a contract remedy, by demanding a sum of money in satisfaction of the wrong, or even by receiving a sum in diminution of damages; but his acceptance of money or other property to the full amount of his claim discharges his cause of action.²¹ Bringing a suit in contract is evidence of election, but, until judgment is obtained, the election is not considered final.²²

257. Discharge by Judgment. When the victim of a tort sues the wrongdoer to judgment and obtains satisfaction thereof, his cause of action is discharged. *Nemo debet bis vexari pro eadem*

v. Babock, 143 Ill. 358, 32 N. E. 271 (1892); Gilbert v. Finch, 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807, 93 Am. S. R. 623 (1903). This case also holds, as does Duck v. Mayeu, that a release to one joint wrongdoer, with a reservation of right to sue the others, is to be construed as a covenant not to sue, rather than as a technical release, in order to carry out the intention of the parties. Contra on this point: Abb. v. Nor. Pac. Ry., 28 Wash. 428, 68 Pac. 954, 58 L. R. A. 293, with valuable note; 92 Am. S. R. 864, with valuable note (1902); McBride v. Scott, 132 Mich. 176, 93 N. W. 243, 61 L. R. A. 445 (1903).

18. Supra, Chap. II.

19. Terry v. Munger, 121 N. Y. 161, 24 N. E. 272 (1891); Carroll v. Fethers, 102 Wis. 436, 78 N. W. 604 (1899).

20. Huffman v. Hughlett, 11 Lea (Tenn.) 549 (1883); Keener, Quasi Contracts, Chap. III.

21. Valpy v. Sanders, 5 C. B. 886, 17 L. J. C. P. 249 (1848); Lythgoe v. Vernon, 5 H. & N. 180, 29 L. J. Ex. 164 (1860); Smith v. Baker, L. R. 8 C. P. 350, 42 L. J. C. P. 155 (1873); Bradley v. Brigham, 149 Mass. 141 (1889).

22. Smith v. Baker, L. R. 8 C. P. 350, 52 L. J. C. P. 155 (1873).

causa.²³ This maxim does not apply, however, where the same conduct of the defendant inflicts two distinct torts upon the plaintiff, for example, false imprisonment and malicious prosecution.²⁴ The maxim does apply to estop a plaintiff, against whom a judgment on the merits has passed in an action for an alleged tort, from suing again for the same cause.²⁵ It also estops one, as we have seen in a former connection, from bringing repeated actions from day to day "as the diurnal effects of the one original wrong happen to mature."²⁶

258. Judgment Against One of Several Wrong-Doers. When a number of persons join in committing a single tort, the victim has his election to sue all of them jointly, or to proceed against each, separately, or to join some and sue the other or others singly.²⁷ This is "because a tort is in its nature a separate act of each individual."²⁸ It follows that one joint wrongdoer cannot plead the non-joinder of his fellows in abatement or in bar;²⁹ nor is it a defense that the plaintiff has another action pending against one of the other wrongdoers.³⁰ It would seem to follow from this right to pursue each wrongdoer separately, that the victim is entitled to a judgment against each; and that nothing short of the satisfaction of a judgment against one wrongdoer should bar his recovery against the others. And this view prevails generally in this country.³¹ In England,³² however, and in a few of our

²³. *Kitchen v. Campbell*, 3 Wils. 304 (1772). *M. & S. Co.*, 225 U. S. 111, 32 Sup. Ct. 64 (1912).

²⁴. *Guest v. Warren*, 9 Ex. 379, 23 L. J. Ex. 121 (1854). ²⁸. *Low v. Mumford*, 14 Johns. (N. Y.) 426 (1817).

²⁵. *Darley Main Colliery Co. v. Mitchell*, 11 A. C. 127, 55 L. J. Q. B. 529 (1885); *Horton v. N. Y. C. Ry.*, 63 Fed. 897 (1894); *St. Louis S. W. Ry. v. Moss* (Tex. Civ. App.), 28 S. W. 1038 (1894); *Blackman v. Simpson*, 120 Mich. 377, 79 N. W. 573, 58 L. R. A. 410 (1899). ²⁹. *Rich v. Pilkington*, Carthew, 171 (1691); *Mitchell v. Tarbutt*, 5 D. & E. 649 (1794).

³⁰. *McAvoy v. Wright*, 137 Mass. 207 (1884).

³¹. *Lovejoy v. Murray*, 3 Wall. (U. S.) 1, 18 L. Ed. 129 (1865); *Blann v. Crocheron*, 19 Ala. 647, 54 Am. Dec. 203, with note (1851); *Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31 (1892); *Grundel v. Union Iron Works*, 127 Cal. 438, 59 Pac. 826, 78 Am. S. R. 75 (1899); *Woodworth v. Gorsline*, 30 Colo. 186, 69 Pac. 705, 58

²⁶. *Supra*, Chap. V, § 3.

²⁷. *Lovejoy v. Murray*, 3 Wall. (U. S.) 1, 18 L. Ed. 129 (1865); *The Atlas*, 93 U. S. 302, 23 L. Ed. 885 (1876). For a very full discussion of this topic, see *Bigelow v. Old Dom.*

States,³³ it is held that the election of the injured party to take judgment against one or more of the wrongdoers puts an end to his claim against the others. If such election were held not to be a defense it would encourage a multiplicity of vexatious actions, it is declared. In case of several joint wrongdoers, it is said, "an unprincipled attorney might be found willing enough to bring an action against each and every of them, and so accumulate a vast amount of useless costs." The maxim, "*interest reipublicae ut sit finis litium*," is invoked by these tribunals to compel the plaintiff to join all the wrongdoers in one suit, or elect which one he will cast in judgment.^{33a}

259. Election by Judgment Creditor. Under the generally prevailing rule, the plaintiff may take several judgments against the various joint tort-feasors, and then elect which judgment he will enforce. This right of election cannot be defeated by a tender of the amount by one of the judgment debtors, nor by a payment into court of the sum adjudged against him.³⁴ Even after issuing execution upon one judgment and collecting a part, if he fails to collect the whole, he may issue execution upon either of the other

L. R. A. (with full note) 417 (1902); *Hawkins v. Hatton*, 1 Nott & McC. Vincent v. McNamara, 70 Conn. 332, 318, 9 Am. Dec. 700 (1818); *Turner v.* 39 At. 444 (1898); *Norfolk Lumber Brock*, 6 Heisk (Tenn.). 50 (1871); *Co. v. Simmons*, 2 Marv. (Del.) 317, Sanderson v. Caldwell, 2 Aik. (Vt.) 43 At. 163 (1897); *Warnack v. People*, 195 (1827); *Griffin v. McClung*, 5 W. 187 Ill. 116, 58 N. E. 242 (1900); Va. 131 (1872).

Elliot v. Porter, 5 Dana (Ky.), 299, 30 Am. Dec. 689 (1837); *Jones v. Yelv.* 68, Moore, 762 (1606); *King v. Lowell*, 35 Me. 541 (1852); *Cleveland Hoare*, 13 M. & W. 494, 14 L. J. Ex. 29 (1844); *Brinsmead v. Harrison*, L. 892, 47 Am. S. R. 326 (1895); *Corey v. R.* 7 C. P. 547, 41 L. J. C. P. 190 Havener, 182 Mass. 250, 65 N. E. 69 (1872).

(1902); *McReady v. Rogers*, 1 Neb. 124, 93 Am. Dec. 333 (1868); *Fowler v. Owen*, 68 N. H. 270, 39 At. 329, 73 Am. S. R. 588 (1895); *Livingston v. Bishop*, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330 (1806); *Russell v. McCall*, 141 N. Y. 437, 36 N. E. 498 (1894); *Martin v. Buffalo*, 128 N. C. 305, 38 S. E. 902, 83 Am. S. R. 679 (1901); *Maple v. Cin., H. & D. Ry.*, 40 Ohio St. 313, 48 Am. R. 685 (1883); *32. Brown v. Wotton*, Cro. Jac. 73, Yelv. 68, Moore, 762 (1606); *King v. Hoare*, 13 M. & W. 494, 14 L. J. Ex. 29 (1844); *Brinsmead v. Harrison*, L. R. 7 C. P. 547, 41 L. J. C. P. 190 (1872).

33. Hunt v. Bates, 7 R. I. 217, 82 Am. Dec. 592 (1862), but see *Parmenter v. Barstow*, 21 R. I. 410, 43 At. 1035 (1899); *Petticolas v. Richmond*, 95 Va. 456, 28 S. E. 566 (1897).

33a. Bradley & Cohn, Ltd. v. Ramsay & Co. (1912), 106 L. T. R. 771, 26 Harv. Law Rev. 171. *34. Blann v. Crocheron*, 20 Ala. 320 (1852); *Power v. Baker*, 27 Fed. 396 (1886).

judgments, crediting thereon whatever he received under the former executions.³⁵

260. The Effect of Satisfying a Judgment for Conversion. When a person, who has converted the property of another, satisfies a judgment against him therefor, he becomes the legal owner thereof. This title, as between the parties to the action, relates back to the date of conversion, inasmuch as that is the time at which the plaintiff has elected to treat the property as having passed from him.³⁶ Until the judgment is satisfied, however, it is held generally that the title remains in the plaintiff, and that he may replevy the property or maintain any other action for redress not inconsistent with his first suit.³⁷ The doctrine of relation is

35. *Lovejoy v. Murray*, 3 Wall. (U. S.) 1, 18 L. Ed. 129 (1865); *Shainwald v. Lewis*, 46 Fed. 839 (1889); *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154 (1863); *McVey v. Mannatt*, 80 Ia. 132, 45 N. W. 548 (1890); *U. S. of Shakers v. Underwood*, 11 Bush. 265, 21 Am. R. 214 (1875); *Cleveland v. City of Bangor*, 87 Me. 259, 32 At. 892, 47 Am. S. R. 326 (1895); *Woods v. Pangburn*, 75 N. Y. 498 (1878); *Brison v. Dougherty*, 3 Baxt. (62 Tenn.) 93 (1873); *Sanderson v. Caldwell*, 2 Alk. (Vt.) 195 (1827). Contra, *Criner v. Brewer*, 13 Ark. 225 (1853); *Ashcraft v. Knoblock*, 146 Ind. 169, 174, 45 N. E. 69 (1896), holding that the judgment creditor makes a final election when he issues an execution against any one of the judgment debtors.

36. *Hepburn v. Sewell*, 5 Har. & J. 211, 9 Am. Dec. 512 (1821); *Smith v. Smith*, 51 N. H. 571 (1872), 50 N. H. 212 (1870); *St. Louis, Etc. Ry. v. McKinsey*, 78 Tex. 298, 14 S. W. 645, 22 Am. S. R. (1890). In the last case, it is said that the title relates to the date of the judgment.

37. *Spivey v. Morris*, 18 Ala. 254, 52 Am. Dec. 224 (1880); *Woodworth v. Gorsline*, 30 Col. 186, 69 Pac. 705, 58 L. R. A. 417, with note (1902); *Miller v. Hyde*, 161 Mass. 472, 37 N. E. 760, 42 Am. S. R. 424, with note; 25 L. R. A. 42 (1894). In this case there are two dissenting opinions. Holmes, J., declares that one whose property has been converted has an election between two courses; he may retake the property or secure a judgment for damages, but that he cannot do both; that his election is determined by judgment. Knowlton, J., was of the opinion that a final election is not made by taking judgment, but is by proceeding to obtain satisfaction by a levy on the defendant's property, especially where he levies on the very property for which he obtained judgment. In *Ex parte Drake*, 5 Ch. D. 866, 46 L. J. Bk. 29 (1877), the court held that a man does not elect himself out of his property by taking a judgment for its value against a converter, nor by proving the claim against the wrong-doer's estate in bankruptcy. Said James, L. J.: "I think it is not the business of any

adopted for the purpose of promoting justice, and will not be applied to render innocent third persons liable as trespassers,³⁸ nor to hold the plaintiff in the trover action liable as indorser of negotiable paper, which he delivered to the converter for a purpose never accomplished by the latter.³⁹

§ 2. DISCHARGE BY OPERATION OF LAW.

261. Death of Either Party. The rule of the common law on this subject is stated by Blackstone⁴⁰ in these words: "In actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery and slander, the rule is that *actio personalis moritur cum persona*; and it never shall be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury." The primitive rule was even broader than this. "The truth is," to quote the language of a learned judge, "that in the earliest times of English law, survival of causes of action was the rare exception, non-survival was the rule."⁴¹ The first modification of this rule was made by a statute during the reign of Edward III,⁴² which enacted that the executors, in case of trespass done to the goods and chattels of their testators, should have an action against the tres-

court of justice to find facilities for enabling one man to steal another man's property."

38. *Bacon v. Kimmel*, 14 Mich. 201 (1866).

39. *Haas v. Sackett*, 40 Minn. 53, 41 N. W. 237, 2 L. R. A. 449 (1889).

40. Blackstone's Commentaries, Bk. III, p. 302. Sir Frederick Pollock thinks the maxim *actio personalis moritur cum persona* may have been justified by the vindictive and quasi-criminal character of suits in primitive law for civil injuries. A process, he says, "which is still felt to be a substitute for private war, may seem incapable of being continued on behalf of or

against a dead man's estate. Some such policy seems to be implied in the dictum, 'If one doth a trespass to me, and dieth, the action is

dead also, because it should be inconvenient to recover against one

who was not party to the wrong."

Newton, C. J., in *Y. B. 19 Hen. VI*, 66, pl. 10 (1440-1441).

41. *Bowen, L. J.*, in *Finlay v. Chirney*, 20 Q. B. D. 494, 57 L. J. Q. B. 247 (1888), holding that an action for breach of promise to marry does not survive the death of the promisor.

42. 4 Ed. III, ch. 7 (1330); 25 Ed. III, ch. 5 (1351).

passers to recover damages, in like manner as the testators should have had, if they were living. This legislation was construed liberally, so as to give a remedy to the personal representatives of the injured party for all torts except those relating to freeholds, and those where the injury done is of a personal nature.⁴³ During the early part of the last century,⁴⁴ statutory provision was made for suits to recover for injuries to real property, if inflicted within six months before the death of the owner, or if the suit was brought within six months after the personal representatives of the wrongdoer had qualified.

262. Legislation in This Country. Similar legislation has been enacted in most of our States,⁴⁵ with the result that where the cause of action is in substance an injury to the person, the death of either party will discharge the tort.⁴⁶ If the wrong is done to the property rights or interests of another, the action will survive the death of the person wronged,⁴⁷ while it will not survive the death of the wrongdoer, unless "property is acquired by him, whereby his estate is benefited."⁴⁸ Allowing an action against the personal

⁴³ *Wilson v. Knubley*, 7 East, 128, 134 (1806); *Twycross v. Grant*, 4 C. P. D. 40, 48 L. J. C. P. 1 (1878); *Oakey v. Dalton*, 25 Ch. D. 700, 56 L. J. Ch. 823 (1887).

⁴⁴ 3 & 4 Will. IV, ch. 42 (1833).

⁴⁵ See "Abatement and Revival," 1 Cyclopaedia of Law and Procedure, p. 52. This legislation has been liberally construed, as a rule, *Hooper v. Gorham*, 45 Me. 209 (1858); *Aylesworth v. Curtis*, 19 R. I. 517, 34 At. 1109, 61 Am. S. R. 785, 33 L. R. A. 110 (1896).

In some States the statute includes only those cases where the injury is occasioned to property by the direct wrongful act of a party upon real or personal property. *Cutting v. Tower*, 14 Gray (80 Mass.), 183 (1859); *Stebbins v. Dean*, 82 Mich. 385, 46 N. W. 778 (1890).

⁴⁶ *Feary v. Hamilton*, 140 Ind. 45, 39 N. E. 516 (1894); *Wade v. Kalb-*

fleisch, 58 N. Y. 282 (1874), holding that an action for breach of promise to marry does not survive the promisor. Cf. *Pulling v. Great Eastern Ry.*, 9 Q. B. D. 110, 51 L. J. Q. B. 453 (1882); *Webber v. St. Paul City Ry.*, 97 Fed. 140, 38 C. C. A. 79 (1899). See note in 61 L. R. A. 352-393, on Effect of Death of Either Party after Judgment.

⁴⁷ *Cregin v. Brooklyn, Etc. Ry.*, 75 N. Y. 192 (1878), action by husband for negligent injuries to his wife, held to be for a wrong to his pecuniary rights and interests and to survive his death; *Gorden v. Strong*, 158 N. Y. 407, 53 N. E. 33 (1899); *Petts v. Ison*, 11 Ga. 153 (1852); *Curry v. Mannington*, 23 W. Va. 18 (1883).

⁴⁸ *Boor v. Lowry*, 103 Ind. 468, 3 N. E. 151, 53 Am. R. 519 (1885), action for malpractice by surgeon does not survive him; *Vittum v. Gil-*

representatives of the wrongdoer, where his estate has been increased by the tort, has been declared not to constitute an exception to the rule that private wrongs are to be buried with the offender. The executor, it is said, is not made liable for the tort of his testator, "but only for the implied promise which the law raises and allows the injured party to put in the place of the wrong."⁴⁹

When the plaintiff brings his suit in a federal court the survival of his action will depend ordinarily upon the common law, as modified by the statutes of the State where the action is brought, or where it might have been brought at the death of the party in question.⁵⁰ If, however, the action is founded upon penal provisions of a federal statute, the question of its survival is determined by federal law.⁵¹

263. The dissolution of a corporation works an abatement of suits against it and prevents the institution of new suits, unless its life is preserved by statute, for the purpose of prosecuting or defending suits, or of settling its affairs.⁵² It has been held, in New York, that the rule *actio personalis moritur cum persona* is not to be extended to the civil death of either natural persons or corporations, and that a suit for libel, abated by the dissolution of the corporation, may be continued against the former directors to reach corporation assets in their hands as trustees.⁵³

man, 48 N. H. 416 (1869); Ott v. Kaufman, 68 Md. 56, 11 At. 580 (1887), accord. In some States the statutes go farther than this. See Shafer v. Grimes, 23 Ia. 553 (1867); Hooper v. Gorham, 45 Me. 209, 214 (1858); Geyer v. Douglass, 85 Ia. 93, 52 N. W. 111 (1892).

49. Mitchell v. Hotchkiss, 48 Conn. 9, 17, 40 Am. R. 146 (1880).

50. Martin v. Bal. & O. Ry., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311 (1893); Bal. & O. Ry. v. Joy, 173 U. S. 226, 19 Sup. Ct. 387, 43 L. Ed. 677 (1901); Webber v. St. Paul City Ry., 97 Fed. 140, 38 C. C. A. 79 (1899).

51. Schreiber v. Sharpless, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. Ed. 65 (1883).

52. Nelson v. Hubbard, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375 (1892); Marlon Phosphate Co. v. Perry, 74 Fed. 425, 20 C. C. A. 490, 41 U. S. App. 14, 33 L. R. A. 252 (1896); 10 Cyclopaedia of Law and Proc., pp. 1310, 1311.

53. Shayne v. Evening Post Pub. Co., 168 N. Y. 70, 61 N. E. 115, 85 Am. S. R. 654, 55 L. R. A. 777, 10 N. Y. Ann. Cases, 237 (1901), reversing s. c. in 56 App. Div. 426, 101 St. R. 937, 67 N. Y. Supp. 937, 9 N. Y. Ann. Cas. 51, with note (1900).

264. Action for Causing Death. According to the common law, as interpreted by the courts of England and of this country, no civil action could be maintained for the death of a human being, caused by the wrongful act or negligence of another, or for any damages suffered by any person in consequence of such death. Various reasons have been assigned for this rule. In the earliest English cases, it is based upon the doctrine that the civil wrong is drowned or merged in the felony.⁵⁴ But we have seen, in a former connection, that this doctrine has never obtained in this country.

Another reason has been sought in the maxim which we have been considering, *actio personalis moritur cum persona*.⁵⁵ This, it has been replied,⁵⁶ “would furnish an adequate reason why no action could be brought by personal representatives, or others, for such damages as the deceased might have recovered for the injury, if death had not ensued, as the action for such damages would not survive. But this reason could have no application whatever to an action brought by a master for loss of services of his apprentice, or by a husband for the loss of his wife,” or by a wife or child for the loss of husband or parent.

Still another reason, which has been assigned, is that “the policy of the law refuses to recognize the interest of one person in the death of another,”⁵⁷—a reason, it has been replied, “which would make life insurance and leases for life illegal.”⁵⁸ Others have professed to find the reason of the rule “in that natural and almost universal repugnance among enlightened nations, to setting a price upon human life, or any attempt to estimate its value by a pecuniary standard.” Those holding this view, admit, however, that “the necessity which has grown out of the new modes of travel and business in modern times” of making railroad corporations and others, to whom passengers are compelled to trust for safety, more careful to secure a high degree of vigilance in protecting the lives intrusted to their control, has reconciled even the cultivated and

⁵⁴. *Higgins v. Butcher*, Yelv. 89, Brownlow, 205 (1606).

⁵⁶. *Hyatt v. Adams*, 16 Mich. 180, 189 (1867).

⁵⁵. *Green v. Hudson R. Ry.*, 28 Barb. (N. Y.) 9, 17 (1858), rejected in *a. c.*, when in the court of Appeals, 2 Keyes, 294, 303, 2 Abb. Dec. 277 (1866).

⁵⁷. *Osborn v. Gillett*, L. R. 8 Ex. 88, 42 L. J. Ex. 53 (1873).

⁵⁸. *Pollock on Torts* (6th Ed.), 63.

enlightened mind of to-day to the idea of compensating the loss of human life in money.⁵⁹

265. Attempt to Substitute the Scotch Rule. In view of the unsatisfactory character of the reasons assigned for the rule, it is a matter of regret and wonder that the courts of the last century did not reject the rule as barbarous, and, if they could not discover a principle of the common law which would justify them in allowing an action, that they did not borrow one from the law of Scotland.⁶⁰ A few judges did make this attempt,⁶¹ but they were overruled by appellate tribunals or overwhelmed by the rising tide of opposing views.⁶² The House of Lords in England,⁶³ and the Supreme Court of the United States⁶⁴ carried the barbarous rule into admiralty jurisprudence.^{64a} Perhaps, the rejection of the more hu-

59. Hyatt v. Adams, 16 Mich. 180, 192 (1867). Robert Lewers Co. v. Kekauoha, 114 Fed. 849 (1902).

60. Cadell v. Black, 5 Paton's App. Cas. 567 (1812). A recovery was allowed by the civil law as understood in Lower Canada; Ravary v. Grand Trunk Ry., 6 Lower Can. Jur. 49 (1861); Can. Pac. Ry. v. Robinson, 14 Duval (Can. Sup. Ct.), 105, 117 (1887).

61. Bramwell, L. J., declared such a principle was found in the common law: "The general principle is in the plaintiff's favor, that *injuria* and *damnum* give a cause of action. It is for the defendant to show an exception to this rule when the *injuria* causes death;" Osborn v. Gillett, L. R. 8 Ex. 88, 42 L. J. Ex. 53 (1873); Cross v. Guthery, 2 Root (Conn.), 90 (1794); Shields v. Younge, 15 Ga. 349, 60 Am. Dec. 698 (1854); James v. Christy, 18 Mo. 162 (1853); Ford v. Monroe, 20 Wend. (N. Y.) 210 (1838); Sullivan v. Union Pac. Ry., 3 Dillon (U. S. Cir. C.), 335 (1874). In Hawaii, the attempt was successful; Kake v. Horton, 2 Hawaii, 209 (1860); Schooner

62. Baker v. Bolton, 1 Camp. 493 (1808); Osborn v. Gillett, L. R. 8 Ex. 88, 42 L. J. Ex. 53 (1873); Goodsell v. Hart, Etc. Ry., 33 Conn. 55 (1865); Carey v. Berkshire, Etc. Ry., 1 Cush. (Mass.) 475 (1848); Hyatt v. Adams, 16 Mich. 180 (1867); Green v. Hudson R. Ry., 2 Keyes (N. Y.), 294 (1866); Insurance Co. v. Brame, 95 U. S. 754, 24 L. Ed. 580 (1877).

63. Seward v. Vera Cruz, 10 App. Cas. 59 (1884).

64. The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358 (1886), overruling numerous decisions in the lower Federal courts, including: The Sea Gull, Chase's Decisions, 145; The Highland Light, Ibid, 150 (1867); Holmes v. Oregon, Etc. Ry., 5 Fed. R. 75, 6 Sawyer, 262 (1880); The Columbia, 27 Fed. 704 (1886).

64a. In re Clyde S. S. Co., 134 Fed. 95 (1905), and cases cited in the opinion, holding that, "A suit may be maintained in a court of admiralty to recover damages from a ves-

mane and enlightened rule of Scotch jurisprudence was made by our courts with a lighter heart, because of the legislation which began with Lord Campbell's Act in England,⁶⁵ giving a cause of action for wrongful death.

266. Common Law Rule Modified by Statute. Lord Campbell's Act did not abolish the rule that a personal action dies with the person. It gave a totally new action against the person, who would have been responsible to the deceased had he lived.⁶⁶ It is entitled, "An Act for compensating the families of persons killed by accidents," and declares that the action against the wrongdoer "shall be for the benefit of the wife, husband, parent (including grand-parent and step-parent) and child (including grand-child and step-child);" that it shall be brought by the personal representative of the deceased; that the jury may give such damages as they think the beneficiaries have sustained by the death, and that the action shall be commenced within twelve calendar months after the death.

Statutes fashioned after this act have been passed in the District of Columbia and in most of our States and Territories. They differ in many respects, and no attempt will be made in this connection to deal with their provisions in detail. It must suffice, to state the most important principles which have been recognized by the courts in enforcing them. Congress has embodied similar provisions in the Federal Employers' Liability Act.^{66a}

267. The Statutes Create a New Cause of Action. In this country, as in England, the legislation upon this topic has been construed by most courts as creating an entirely new cause of action,⁶⁷

sel at fault for a collision on the high seas for loss of life resulting from the sinking of the other vessel, where a right of recovery for wrongful death is given by the statutes of the State in which both vessels belonged, both being a part of the territory of such State and subject to its laws." declared that the action will not lie, unless there is some person answering the description of the widow, parent or child, who suffers pecuniary loss.

⁶⁵. 9 & 10 Vict. c. 93.

⁶⁶. *Seward v. Vera Cruz*, 10 App. Cas. 59 (1884). In this case, it is

^{66a}. *American Railroad Company of Porto Rico v. Birch*, 224 U. S. 547, 32 Sup. Ct. 603 (1912).

⁶⁷. *Munroe v. Dredging Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. S. R. 248 (1890); *Kansas Pac. Ry. v. Miller*, 2 Colo. 442 (1874); *Donaldson*

and not as transferring to the personal representative the right of action, which the deceased person would have had, if he had survived the injury; although the statutes of some States have been differently construed.⁶⁸ As the cause of action is thus purely statutory, the plaintiff is bound to show that he is the proper person to bring the action; that at least one of the class named as beneficiaries is in existence and entitled to damages, and that the defendant comes within the class to whom the statute applies.⁶⁹ If there are no persons in existence, who are entitled under the statute to take the proceeds of the action as beneficiaries, the action will not lie,⁷⁰ except in a few jurisdictions and under peculiar statutory provisions.⁷¹ In case the sole beneficiary dies during the pendency of the action, the action will abate under some statutes,⁷² but not under others.⁷³ The marriage of a widow, it has been held, does

v. Miss. Ry., 18 Ia. 280, 87 Am. Dec. 606 (1895); *Lewis v. Heulock's*, 391 (1865); *McKay v. New England Dredging Co.*, 93 Me. 201, 43 At. 29 (1899); *Wooden v. Western N. Y. Ry.*, 126 N. Y. 10, 26 N. E. 1050, 22 Am. S. R. 803, 13 L. R. A. 458 (1891); *Penn. Ry. v. Vandever*, 36 Pa. 298 (1860); *In re Estate of Mayo*, 60 S. C. 401, 38 S. E. 684, 54 L. R. A. 660 (1901).

68. *Goodsell v. Hartford, Etc. Ry.*, 33 Conn. 51 (1865); *Hennessy v. Vavarian Brewing Co.*, 145 Mo. 104, 46 S. W. 966, 68 Am. S. R. 554, 41 L. R. A. 385 (1898); *Legg v. Britton*, 64 Vt. 652, 24 At. 1016 (1890); *Brown v. Chic., Etc. Ry.*, 102 Wis. 137, 77 N. W. 748, 44 L. R. A. 579 (1899). Two classes of statutes in this State. See *Tiffany, Death by Wrongful Act*, Chap. 2, for classification of different American statutes.

69. *Walker v. Vicksburg, Etc. Ry.*, 110 La. 718, 34 So. 749 (1903); *Wooden v. Western N. Y. Ry.*, 126 N. Y. 10, 26 N. E. 1050, 22 Am. S. R. 803, 13 L. R. A. 458 (1891); *Myers v. Holborn*, 58 N. J. L. 193, 33 At. 389, 30 L. R. A. 345, 55 Am. S. R. 606 (1895); *Lewis v. Heulock's*, 391 (1865); *McKay v. New England Dredging Co.*, 93 Me. 201, 43 At. 29 (1899); *Wooden v. Western N. Y. Ry.*, 126 N. Y. 10, 26 N. E. 1050, 22 Am. S. R. 803 (1902); *Lipscomb v. Houston, Etc. Ry.*, 95 Tex. 5, 64 S. W. 923, 93 Am. S. R. 804 (1901). The plaintiff must show that the death was due to defendant's wrongful act or omission, *Rutherford v. Foster*, 125 Fed. 187, 60 C. C. A. 129 (1903); *Nor. Pac. Ry. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408 (1904); *Johnson v. Southern Pac. Ry.*, 154 Cal. 285, 97 Pac. 520 (1908).

70. *Brown v. Chic., Etc. Ry.*, 102 Wis. 137, 77 N. W. 748, 44 L. R. A. 579 (1899); *Webster v. Norwegian Co.*, 137 Cal. 399, 70 Pac. 276, 92 Am. S. R. 181 (1902).

71. *Florida Cent. Ry. v. Foxworth*, 41 Fla. 1, 25 So. 338, 79 Am. S. R. 149 (1899).

72. *Sanders' Admx. v. Louisville, Etc. Ry.*, 111 Fed. 708 (1901).

73. *Cooper v. Shore Elec. Co.*, 63 N. J. L. 558, 44 At. 633 (1899). But the death affects the quantum of recovery, as his loss is limited to his life-time.

not affect the right of action in her behalf for the wrongful death of her former husband.⁷⁴

268. Construction of the Statutes. While the courts are generally agreed that the plaintiff must show, that the action which he brings is clearly authorized by the statute under which he claims, and, to this extent, insist upon a strict construction,⁷⁵ the weight of authority favors the view that the "statutes are not penal but remedial, for the benefit of the persons injured by the death; that their substantial purpose is to do away with the obstacle to a recovery caused by the death."⁷⁶

269. Damages Recoverable. Upon this topic the statutes are far from uniform. Most of them authorize the recovery of such damages as will compensate the beneficiaries for the pecuniary harm which the evidence shows they have suffered,⁷⁷ although a maximum is fixed beyond which the verdict shall not go. In some States punitive damages are allowed.⁷⁸ Generally, the fact that the statutory beneficiaries have received money on policies of insurance on the life of deceased, is inadmissible on the question of damages.⁷⁹ Nor is the fact admissible that the beneficiaries have inherited a large estate from the deceased.⁸⁰

Whether the plaintiff is entitled to recover nominal damages, in the absence of allegation and proof of special pecuniary harm, is a question upon which the courts are at variance. In England⁸¹ and

74. *Chic., Etc. Ry. v. Lagerkraas*, 65 Neb. 566, 91 N. W. 358 (1902).

75. *McMillan v. Spider, Lake Co.*, 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589 (1902).

76. *Stewart v. Bal. & O. Ry.*, 168 U. S. 445, 18 Sup. Ct. 106, 42 L. Ed. 538 (1897); *Vetaloro v. Perkins*, 101 Fed. 393 (1900); *Bonthron v. Phoenix Light Co. (Arizona)*, 71 Pac. 941, 61 L. R. A. 563 (1903).

77. See *Tiffany, Death by Wrongful Act*, §§ 153-154, and authorities cited; *McKay v. New England Dredging Co.*, 92 Me. 454, 43 At. 29 (1899); *May v. West Jersey Ry.*, 62 N. J. L. 63, 42 At. 163 (1899).

78. See *Ibid*, § 155; *Louisville, Etc. Ry. v. Lansford*, 102 Fed. 62 (1900).

79. *Sherlock v. Alling*, 44 Ind. 184 (1873); *Althorf v. Wolfe*, 22 N. Y. 355 (1860); *Coulter v. Township*, 164 Pa. 543, 30 At. 490 (1894); *Lipscomb v. Houston, Etc. Ry.*, 95 Tex. 5, 64 S. W. 923, 93 Am. S. R. 804, 55 L. R. A. 869 (1901).

80. *Stahler v. Phila., Etc. Ry.*, 199 Pa. 383, 49 At. 273, 85 Am. S. R. 791 (1901).

81. *Duckworth v. Johnson*, 4 H. & N. 653, 29 L. J. Ex. 25 (1859).

in some of our States⁸² a negative answer has been given. These authorities declare that "the law requires, in this class of cases, that the administrator must show that some person has suffered some pecuniary injury by the death. The statute does not imply that damages and pecuniary loss necessarily flow from the negligent killing. This is a matter that must be made to appear by the proper allegation in the declaration, and proof of fact."⁸³

The weight of authority in this country, however, appears to favor the view that pecuniary damage is presumed from the fact of death; and that the plaintiff is entitled to nominal damages, even though he fails to allege and prove specific pecuniary harm.⁸⁴

Funeral expenses of the deceased are not recoverable under the statute in England,⁸⁵ but are generally in this country, if the law imposes upon any of the relatives, for whose benefit the suit is brought, the obligation to bear such expenses.⁸⁶ This is based upon the fact, that the sum, recoverable under the statutes, represents the entire pecuniary loss resulting from the death to each and all of the persons mentioned in the statute.

270. Effect of Bankruptcy on Tort Actions. This depends upon whether the victim of the tort, or the tort-feasor becomes bankrupt.

(a) If the bankruptcy is that of the victim, it does not operate as a bar to the tort action. In case the tort is a personal one, the bankrupt may bring or continue an action therefor, after bank-

82. *Hurst v. Detroit City Ry.*, 84 Mich. 539, 48 N. W. 46 (1891); *Or-gall v. Chic., Etc. Ry.*, 46 Neb. 4, 64 N. W. 450 (1895); *McGown v. International, Etc. Ry.*, 85 Tex. 289, 20 S. W. 80 (1892); *Regan v. Chic., Etc. Ry.*, 51 Wis. 599 (1881); *In re Calif. Nav. & Imp. Co.*, 110 Fed. 670 (1901);

a decision in admiralty.

83. *Rouse v. Detroit Elec. Ry.*, 128 Mich. 149, 87 N. W. 68 (1901).

84. *North Chic. Street Ry. v. Brodie*, 156 Ill. 317, 40 N. E. 942 (1895); *Korrady v. Lake Shore, Etc. Ry.*, 131 Ind. 261, 29 N. E. 1069 (1891); *Chic., Etc. Ry. v. Thomas*,

155 Ind. 634, 55 N. E. 861 (1900); *Quinn v. Moore*, 15 N. Y. 432 (1857); *Haug v. Great Nor. Ry.*, 8 N. Dak. 23, 77 N. W. 97, 42 L. R. A. 664, 73 Am. S. R. 727 (1898); *Peden v. Am. Bridge Co.*, 120 Fed. 523 (1903).

85. *Dalton v. S. E. Ry.*, 4 C. B. N. S. 296, 27 L. J. C. P. 227 (1858).

86. *Owen v. Brockschmidt*, 54 Mo. 285 (1873); *Murphy v. N. Y. C. Ry.*, 88 N. Y. 445, (1882); *Penn. Ry. Co. v. Bantom*, 54 Pa. 495 (1867); *Petrie v. Col., Etc. Ry.*, 29 S. C. 303, 7 S. E. 515 (1888).

ruptcy, as he could before.⁸⁷ In case, however, the tort consists in an injury to property rights, as distinguished from a personal wrong, the right of action passes to the assignee or trustee in bankruptcy, and is to be prosecuted by him.⁸⁸

(b) The bankruptcy of the tort-feasor, although followed by a decree or order of discharge, does not relieve him from liability to an action therefor in England.⁸⁹ In this country the language of the statute is not quite so sweeping on this topic. It is as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; * * * or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in fiduciary capacity."⁹⁰

271. Statute of Limitations. This statute provides that the various actions for torts shall not be brought, after the expiration of varying but definite periods. In England the statute⁹¹

87. *Howard v. Cruther*, 8 M. & W. 601 (1841). Action for seduction of servant. On p. 604, Alderson, B.,

said: "Assignees can maintain no action for libel, although the injury occasioned thereby to the man's reputation may have been the sole cause of his bankruptcy." In *re Haensell*, 91 Fed. 355 (1899), holding that a cause of action for a malicious prosecution and arrest formed no part of the bankrupt victim's estate. *Colwell v. Tinker*, 169 N. Y. 536, 62 N. E. 668, 58 L. R. A. 531, 7 Am. B. R. 344 (1902).

88. *Hodgson v. Sidney* L. R., 1 Ex. 313, 35 L. J. Ex. 182 (1866); *Morgan v. Steble* L. R., 7 Q. B. 611, 41 L. J. Q. B. 260 (1872); *Tiffany v. Boatman's Bank*, 18 Wall. (U. S.) 375, 21 L. Ed. 868 (1873); *Wheelock*

v. Lee, 64 N. Y. 242 (1876); U. S. Bankruptcy Act, 1898, §§ 70(a) and (b).

89. Clerk & Lindsell on Torts (2d Ed.), 36; 46 and 47 Vict. ch. 52, § 37.

90. U. S. Bankruptcy Act of 1898, § 17, as amended 1903. For a discussion of this section, see Collier on Bankruptcy (4th Ed.), 188-204 (9th Ed.), 380-405. *Audubon v. Shufeldt*, 181 U. S. 575, 21 Sup. Ct. R. 735; 45 L. Ed. 1009 (1901); *Dunbar v. Dunbar*, 190 U. S. 340; 23 Sup. Ct. 757 (1903); *Bryant v. Kinyon*, 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801 (1901).

91. Ch. 16, 21 James I, as amended by ch. 3, 4 and 5 Anne, ch. 97, § 12, 19 and 20 Vict. and ch. 75, § 1, 45 and 46 Vict.

divides tort actions into three classes, assigning to the first class a term of limitation of six years; to the second class four years, and to the third class two years. These classes have been briefly described as follows: "Six years. Trespass to land and goods, conversion, and all other common law wrongs (including libel), except slander by words actionable *per se* and injuries to the person. Four years. Injuries to the person (including imprisonment). Two years. Slander by words actionable *per se*." ⁹²

In this country, while legislation upon this topic has been fashioned upon the statute of James, the laws of each jurisdiction should be examined by the reader, for they differ in various respects. We can attempt, here, to deal only with the general principles underlying them.

272. Exemptions from Statutory Bar. It is frequently provided that infants and other persons under legal disability, as well as persons absent from the State, shall be exempted from the running of the statute, during such period of disability or absence.⁹³ At times, however, no such exemption is found in the statute, and it has been argued in behalf of the person under disability or absent, that he was entitled to exemption by reason of an inherent equity. But this argument has been pronounced unsound, and the rule declared that the exemptions, generally accorded to such persons, do not rest upon any general doctrine of the law that they cannot be subjected to the action of the statutes, but, in every instance, upon express language in those statutes giving them, after the expiration of disability or absence, a definite time to assert their rights.⁹⁴ "And where the statute has created specific exceptions, all others must be deemed excluded; the courts are without authority to enlarge or change those specified, or establish others, though in particular cases the ends of justice might seem to be subserved, if it were done." ⁹⁵

⁹². Pollock on Torts (6th Ed.), 27 L. Ed. 808 (1882); Murray v. Chic., Etc. Ry., 92 Fed. 868, 35 C. C. 205.

⁹³. McFarlane v. Grober, 70 Ark. A. 62 (1899); Carden v. Louisville, 371, 69 S. W. 56, 91 Am. S. R. 84 Etc. Ry., 101 Ky. 113, 39 S. W. 1027 (1902); Jenkins v. Jensen, 24 Utah (1897); Bickle v. Chrisman, 76 Va. 108, 66 Pac. 773, 91 Am. S. R. 783 678 (1882); Jones v. Lemon, 26 W. (1901); Parker v. Kelly, 61 Wis. 552 Va. 629 (1885).
(1884).

⁹⁵. Powell v. Kohler, 52 Ohio St.

⁹⁴. Vance v. Vance, 108 U. S. 514, 103, 39 N. E. 195, 26 L. R. A. 480, 49

As soon as the disability is removed, the statute begins to run, and the person has the statutory period thereafter within which to bring the action, although he is not precluded from suing, while the disability lasts.⁹⁶ If the statute of limitations once begins to run, however, it does not cease to run on account of any subsequent disability, unless the statute expressly provides for interruption.⁹⁷

273. Beginning of Statutory Period. The period of limitations dates from the accrual of the cause of action. Wherever the gist of the cause of action is the wrongdoing of the defendant, the date of the act is the beginning of the statutory period.⁹⁸ But where the damage to the victim, rather than the misconduct of the tortfeasor, is the gist of the action, the statute does not begin to run until the damage is suffered.⁹⁹ In case of seduction, the cause of action accrues at once, although the amount of recovery may be affected by subsequent events.¹⁰⁰ In case of trespass to property, the

Am. S. R. 705 (1894); cf. *Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. 537, 31 L. Ed. 953 (1888), for discussion of equity rule that the running of the statute is suspended on the ground of fraud. In this case it is said: "True, in a few instances, courts have apparently made exceptions not found in the statute; but they are only such as arise from a state of war, or other imperative necessity, as when courts are shut, or by the act of law one party is forbidden to sue, or the other is rendered incapable of being sued." See *Hanger v. Abbott*, 6 Wall. (U. S.) 532, 18 L. Ed. 939 (1867). (Courts in States in rebellion closed); *St. Paul, Etc. Ry. v. Olson*, 87 Minn. 117, 91 N. W. 294, 94 Am. S. R. 693 (1902). (Person prevented from exercising his remedy by paramount authority.)

^{96.} *Powell v. Kohler*, *supra* and cases there cited.

^{97.} *Jenkins v. Jensen*, 24 Utah 108, 66 Pac. 773, 91 Am. S. R. 783 (1901).

^{98.} *Herreshoff v. Tripp*, 15 R. I. 92, 23 At. 104 (1885).

^{99.} *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. D. 125; 53 L. J. Q. B. 471 (1884), s. c., sub nom. *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127, 55 L. J. Q. B. 529 (1886); Lord Blackburn's dissenting opinion is worthy of a careful perusal; *St. Louis I. M. & S. Ry. v. Biggs*, 52 Ark. 240, 12 S. W. 331, 20 Am. S. R. 174, 6 L. R. A. 804 (1889). Also *Hot Springs Co. v. McCray*, 106 Va. 461, 56 S. E. 216, 10 L. R. A. N. S. 465 (1907); *Skeppwith v. Albermarle Soapstone Co.*, 185 Fed. 15, 107 C. C. A. 119 (1911).

^{100.} *Hutcherson v. Durden*, 113 Ga. 987, 39 S. E. 495, 54 L. R. A. 871 (1901); *Dunlap v. Linton*, 144 Pa. 335, 22 At. 819 (1891). In *Davis v. Young*, 90 Tenn. 303, 16 S. W. 473, it was held, that where the seduction was effected by a fraudulent promise of marriage, and subsequent acts of illicit intercourse were induced by continuation and renewal of the promise, the statute began to run from the last act of seduction.

right of action is complete, ordinarily, upon the doing of the act,¹ but in the case of some forms of nuisance or other injury to property interests, there is no actionable wrong, until actual harm is done.²

The cause of action against a physician or surgeon for malpractice accrues at the date of his unskillful act;³ but if, after doing an improper act, he continues to care for the patient, and during such period continues the unskillful treatment, the statute does not begin to run until the termination of his employment.⁴ The cause of action for conversion accrues at the date of the wrongful asportation.⁵ If a demand by the owner and refusal by the possessor are necessary to complete the conversion, of course, the statute will not begin to run until such demand and refusal.⁶ In other torts, a demand may be necessary before the cause of action accrues.⁷

274. Conflict of Laws. As a rule, statutes of limitations constitute a part of the *lex fori*. Whether the tort is one at common law or depends upon a statute of the jurisdiction where it is inflicted, if the action is brought in another jurisdiction, the statute of limitations applicable to the case is that of the forum; unless the local statute, which creates the right, also limits the duration of the right within a prescribed time.⁸

1. *St. Louis, Etc. Ry. v. Anderson*, 62 Ark. 360, 35 S. W. 791 (1896). 5. *County Board of Education v. State Board of Education*, 107 N. C. 366, 12 S. E. 452 (1890).

2. *St. Louis, Etc. Ry. v. Biggs*, 52 Ark. 240 (1889); *Sherlock v. Louisville, Etc. Ry.*, 115 Ind. 22; 17 N. E. 171 (1888). 6. *Haire v. Miller*, 49 Kan. 270, 30 Pac. 482 (1892).

3. *Fadden v. Satterlee*, 43 Fed. 568 (1890). 7. *In re Tidd: Tidd v. Overell* (1893), 3 Ch. 154; *Quinn v. Cross*, 24 Ore. 147, 33 Pac. 535 (1893).

4. *Gillette v. Tucker*, 67 Ohio St. 106, 65 N. E. 865, 93 Am. S. R. 639 (1902). But see dissenting opinion. 8. *Williams v. St. L., Etc. Ry.*, 123 Mo. 573, 27 S. W. 387 (1894); *Minor's Conflict of Laws*, §§ 202, 210.

CHAPTER VII.

PARTICULAR TORTS.

§ 1. ORDER OF TREATMENT.

275. Having considered briefly the history of this branch of the law, and having discussed at length the general principles which determine tort liability, as well as the remedies therefor, we proceed to the consideration of the most important classes of torts.

These will be dealt with in the following order: First, torts which are directed principally against the person of the victim. Second, torts which are aimed at the property of the victim. Third, torts which are clear invasions of both the personal and property rights of another.

§ 2. FALSE IMPRISONMENT.

276. **Violates the Right of Personal Liberty.** English law has always shown itself solicitous to guard the liberty of the individual. It, therefore, punishes false imprisonment as a crime, and gives to the person unlawfully imprisoned a civil action for damages. It is with the tort action only that we are now concerned. A person is said to be imprisoned "in any case where he is arrested by force and against his will, although it be on the high street or elsewhere, and not in a house."¹

277. **What Constitutes Arrest.** "Mere words will not constitute an arrest; and if the officer says, 'I arrest you,' and the party runs away,"² or having a weapon in his hand, keeps the officer from touching him and so gets away,³ there is no arrest. If, however, the officer touches him, in the attempt to take him into custody, there is an arrest, though the officer may not succeed in stopping and holding him.⁴

1. Thorpe, C. J., in Year Book of Assizes, f. 104, pl. 85 (1348). 3. Genner v. Sparks, 1 Salk. 79, 6 Mod. 173 (1704).

2. Russen v. Lucas, 1 C. & P. 153 4. Whitehead v. Keyes, 3 Allen (85 (1824); Hill v. Taylor, 50 Mich. 549, Mass.) 495, 81 Am. Dec. 672 (1862); 15 N. W. 899 (1883); Huntington v. Anonymous, 7 Mod. 8 (1702).
Shultz, Harper Law (S. C.), 452, 18 Am. Dec. 660 (1824).

Neither touching a person, nor actually overpowering him by force is necessary to an arrest. If the officer, or one purporting to act as an officer gives another to understand either by words or acts that the latter is his prisoner, and the party acquiesces in the arrest and submits his will and surrenders his liberty to the officer, there is an imprisonment. One is not obliged to incur the risk of personal violence and insult by resisting.⁵ It has even been held that one is imprisoned, while being shadowed by detectives, if it appears "he was in fact deprived of all freedom of action, and that whatever consent he gave to such restraint was an enforced consent."⁶ However, a person cannot be imprisoned, who is not cognizant of any restraint,⁷ nor whose way is obstructed but who is at liberty to go anywhere else but over this particular way,⁸ nor who is induced by false statements to go where he otherwise would not have gone,⁹ or to stay where he otherwise would not have remained,¹⁰ nor who voluntarily places himself in a situation where another may lawfully do what results in restraining his liberty.¹¹

5. *Collins v. Fowler*, 10 Al. 859 (1846); *Courtoy v. Dozier*, 20 Ga. 369 (1856); *Simmons v. Richards*, 171 Mass. 281, 50 N. E. 617 (1898); *Moore v. Thompson*, 92 Mich. 498, 52 N. W. 1000 (1892); *Pike v. Hanson*, 9 N. H. 491 (1838); *Browning v. Rittenhouse*, 40 N. J. L. 230 (1878); *Gold v. Bissel*, 1 Wend. (N. Y.), 210 (1828); *Mead v. Young*, 2 Dev. & Batt. (19 N. C.) 521 (1837); *McCracken v. Ansley*, 4 Strob. L. (S. C.) 1 (1849); *Smith v. State*, 7 Humph. (Tenn.) 43 (1846); *Sorenson v. Dundas*, 50 Wis. 335 (1880); *Wood v. Lane*, 6 C. & P. 774 (1834); see note to *Hawkins v. Comm.*, 14 B. Mon. (Ky.) 395 (1854), in 61 Am. Dec. 151-164.

6. *Fotheringham v. Adams Ex. Co.*, 36 Fed. 252, 1 L. R. A. 474 (1888); see *Schultz v. Frankfort Marine A. Etc. Co.*, Wis. , 139 N. W. 386 (1913), 13 Columbia Law Rev. 336. Cf. *Smith v. State*, 7 Hunph. (Tenn.) 43 (1846).

7. *Herring v. Boyle*, 1 C. M. & R. 377 (1834).

8. *Bird v. Jones*, 7 Q. B. 742, 15 L. J. Q. B. 82 (1845). See dissenting opinion of Lord Denman. The majority opinion declares that imprisonment "includes the notion of restraint within some limits defined by a will or power exterior to our own."

9. *State v. Leunsford*, 81 N. C. 528 (1879). Prosecutor voluntarily went with defendant as the result of a practical joke, induced by false statement.

10. *Payson v. Macomber*, 3 Allen (85 Mass.), 69. Defendant induced plaintiff to go to Salem and stay there, so as not to be a witness against a third person, but no force or threat of force shown.

11. *Moses v. Du Bois*, Dudley (S. C. Law) 209 (1838); *Spoor v. Spooner*, 12 Met. (53 Mass.) 281 (1847). Defendant, in each case, carried plaintiff to sea, but the latter had ample opportunity to leave before the ship started; *Robertson v. Balmain*

Imprisonment may be effected by one who is not an officer,¹² and who does not pretend to act in an official capacity.^{12a} A person who is locked in a room and forced to stay there against his will,¹³ or who is kept in a building by threats of another to hurt him, if he ventures out, is imprisoned.¹⁴

An action for false imprisonment lies in favor of the committee of an incompetent against one unlawfully taking the ward, though the latter is not coerced.^{14a}

278. Unlawfulness of Imprisonment. Any imprisonment which is not legally justifiable is a false imprisonment, and subjects him who is responsible therefor, whether as principal or agent, to an action in tort for damages.¹⁵ The plaintiff in such action need not prove that the defendant acted maliciously or without probable cause, or with any wrongful intention, nor that actual harm of any sort was done to him.¹⁶ He makes out a *prima facie* case by showing the imprisonment, and it then devolves upon the defendant to prove that the imprisonment was lawful and that he was justified in what he did.¹⁷

See p. 277

279. Justification Under Legal Process. In a former chapter, it was shown that a ministerial officer is not liable in tort for enforcing process fair on its face and issued by a court or magistrate of competent jurisdiction.¹⁸ Accordingly, if he arrests and im-

New Ferry Co. (1909), A. C. 295, 79 377, 82 N. W. 291, 80 Am. St. R. 33 L. J. P. C. 84. (1900).

12. Price v. Bailey, 66 Ill. 49 (1872); Hildebrand v. McCrum, 101 Ind. 61 (1884). 16. Rich v. McInerny, 103 Ala. 345, 15 So. 663, 49 Am. St. R. 32 (1893); Comer v. Knowles, 17 Kan. 436 (1877); Glazar v. Hubbard, 102 Ky. 68, 42 S. W. 1114, 80 Am. St. R. 340, 39 L. R. A. 210 (1897).

12a. Cook v. Hastings, 150 Mich. 289, 114 N. W. 71, 14 L. R. A., N. S. 1123 (1907). 17. Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250; Mitchell v. State, 12 Ark. 50, 54 Am. Dec. 253 (1851), with note, pp. 258-271; Jackson v. Knowlton, 173 Mass. 94, 53 N. E. 134 (1899); Snead v. Bonnoil, 166 N. Y. 325, 59 N. E. 899 (1901); Chase v. Ingalls, 97 Mass. 524 (1867).

13. Woodward v. Washburn, 3 Den. (N. Y.) 369 (1846); Kroeger v. Passmore, 36 Mont. 504, 93 Pac. 805, 14 L. R. A., N. S. 988 (1907). 18. Supra, Chap. III; O'Shaughnessy v. Baxter, 121 Mass. 515

14. McNay v. Stratton, 9 Bradw. (Ill. App.) 215 (1881).

14a. Barker v. Washburn, 200 N. Y. 280, 93 N. E. 958 (1911).

15. Bergeron v. Peyton, 106 Wis. 377, 82 N. W. 291, 80 Am. St. R. 33 L. J. P. C. 84. (1900).

prisons a person under such process, the victim cannot maintain an action for false imprisonment, although he may be entitled to an action for malicious prosecution against someone else.¹⁹ If, however, the process is void it will protect no one who is responsible for its enforcement.²⁰ Moreover, the protection of valid legal process may be lost by its abuse,²¹ as when it is wrongfully employed to force the imprisoned person to pay a debt,²² or to pay illegal fees.²³ In such cases, the one abusing the process is treated as though he were a trespasser *ab initio*. "When the law has given an authority," it is said, "it is reasonable that it should make void everything done by the abuse of that authority, and leave the abuser as if he had done everything without authority."²⁴ It is deemed to be against "sound public policy to permit a man to justify himself at all under a license or authority allowed him by law, after he has abused it, and used it for improper purposes. The presumption of law is, that he who thus abuses such authority, assumed the exercise of it in the first place for the purpose of abusing it."²⁵

280. Process Under Unconstitutional Statute or Ordinance.
An unconstitutional statute or ordinance is for all legal purposes,

(1877); *People v. Warren*, 5 Hill U. S. App. 505, 29 C. C. A. 670 (1898); (N. Y.) 440 (1843). *Everett v. Henderson*, 146 Mass. 89, 14

19. *Rich v. McInerney*, 103 Ala. 345, N. E. 932 (1888); *Worden v. Davis*, 15 So. 663, 49 Am. St. R. 32 (1893); 195 N. Y. 391, 88 N. E. 745, 22 L. R. Marks v. Townsend, 97 N. Y. 590 A., N. S. 1196 (1909), reversing 123 (1885); *Tryon v. Pingree*, 112 Mich. App. Div. 193, 126 N. Y. Supp. 525 338, 70 N. W. 905, 37 L. R. A. 222, 67 (1908); *Neimitz v. Conrad*, 22 Ore. Am. St. R. 399 (1897), with note, pp. 164, 29 Pac. 548 (1892).

408-427: *Bohri v. Barnett*, 144 Fed. 21. *Wood v. Graves*, 144 Mass. 365, 389 (1906), 6 Columbia Law Rev. 586. 11 N. E. 567, 59 Am. R. 365 (1887);

20. *Fukumoto v. Marsh*, 130 Cal. 86, Carlton v. Taylor, 50 Vt. 200 (1877). 62 Pac. 303, 509, 80 Am. St. R. 73 22. *Grainger v. Hill*, 4 Bing. N. C. (1900); *Clyma v. Kennedy*, 64 Conn. 212 (1838); *Holley v. Mix*, 3 Wend. 310, 29 At. 539, 42 Am. St. R. 194; (N. Y.) 350, 20 Am. Dec. 702 (1829); *Comm. v. Crotty*, 10 Allen (Mass.) Baldwin v. Weed, 17 Wend. (N. Y.) 403 (1865); *Wachsmith v. Merch. Nat. Bk.*, 96 Mich. 427, 56 N. W. 9; 21 L. R. 224, 234 (1837).

A. 278 (1893); *West v. Cabell*, 153 23. *Robbins v. Swift*, 86 Me. 197, U. S. 78, 14 Sup. Ct. 752 (1894). For 29 At. 981 (1894).

the distinction between void process, 24. *Allen v. Crofoot*, 5 Wend. (N. Y.) 506 (1830).

irregular process and voidable process. 25. *State v. Moore*, 12 N. H. 42 see *Bryan v. Congdon*, 86 Fed. 221; 57 (1841).

as if it had never been enacted.²⁶ All proceedings under it, though nominally conducted in a court of justice, are in truth *coram non judice*. Process issuing from legal tribunals in such circumstances is void, and should afford no defense, either to the parties setting the proceedings in motion, or to the officers enforcing the process. Such is the holding in some jurisdictions.²⁷ In others, however, it has been held that not only the judicial officers, who have sustained the constitutionality of the statutes or ordinances, are free from liability to tort actions, as upon the principles, heretofore stated, they would be,²⁸ but that ministerial officers, enforcing process in such cases, are also protected.²⁹

Even judicial officers are liable for false imprisonment, when they issue an order of arrest and procure its enforcement, without color of legal authority or jurisdiction.³⁰

281. Arrest Without a Warrant. (a) By Peace Officers. In order to prevent the escape of criminals and to bring them to justice promptly, the law permits their arrest without a warrant. A person who is guilty of a breach of the peace, may be arrested by a peace officer, who is present, even though the latter is "the person upon whom the peace is broken."³¹ Generally speaking, the arrest of one who has been guilty of a breach of the peace, is not justified after he has escaped from the place, or peace has been

26. Cooley, *Principles of Constitutional Law* (1st Ed.), 155; *Sumner v. Beeler*, 50 Ind. 341 (1875); *Norton v. Shelby Co.*, 118 U. S. 425, 442, 6 Sup. Ct. 1125, 30 L. Ed. 186 (1886). But see *State v. Poulin*, 105 Me. 224, 74 At. 119 (1909); 8 Mich. L. Rev. 229.

27. *Sumner v. Beeler*, 50 Ind. 341 (1875); *State v. Hunter*, 106 N. C. 796, 11 S. E. 366, 8 L. R. A. 529 (1890); *Bärting v. West*, 29 Wis. 307, 9 Am. R. 576 (1871); *Campbell v. Sherman*, 35 Wis. 103 (1874).

28. *Supra*, Chap. III, Cf. *Roth v. Shupp*, 94 Md. 55, 50 At. 430 (1901).

29. *Trammel v. Russellville*, 34 Ark. 105, 36 Am. R. 1 (1879); *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633, 24 Am. S. R. 137 (1891); *Tillman v. Beard*, 121 Mich. 475, 80 N. W. 248 (1899). Persons, called upon by an officer to assist him in enforcing void process, and who do assist in ignorance of the character of the process, are protected in some States. *Reed v. Rice*, 2 J. J. Marshall (Ky.) 44; 19 Am. Dec. 122 (1829); *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885 (1888); but not in others, *Oystead v. Shed*, 12 Mass. 506, 511 (1815); *Elder v. Morrison*, 10 Wend. (N. Y.) 128 (1833).

30. *Stephens v. Wilson*, 115 Ky. 27, 72 S. W. 336 (1903).

31. Anonymous Y. B. H. VII, f. 6, pl. 12 (1490).

restored.³² But so long as the conduct of the wrongdoer is such as to show that the public peace is likely to be endangered by his acts, his arrest without a warrant is justifiable.³³

At common law, petty criminal offenders who are not guilty of a breach of the peace, are not subject to arrest without a warrant, and a peace officer who so arrests them is liable to an action for false imprisonment.³⁴

By statute, in some jurisdictions, a peace officer is authorized to arrest without a warrant for any crime or public offense committed or attempted in his presence.³⁵

He is justified, at common law, in arresting, without warrant, a person who has committed a felony, although not in his presence. The law goes even further and allows the officer "having reasonable ground to suspect that a felony has been committed, to detain the party suspected until inquiry can be made by the proper authorities."³⁶ In some States,³⁷ legislature has limited the officer's

32. *Regina v. Walker*, Dearsley Cr. Cas. 358 (1854); *Wahl v. Walton*, 30 Minn. 506 (1883); *Quinn v. Heisel*, 40 Mich. 576 (1870); *State v. Lewis*, 50 Ohio St. 179, 33 N. E. 405 (1893).

33. *Timothy v. Simpson*, 1 C. M. & R. 757, 6 C. & P. 499, 5 Tyrr. 244 (1835); *Loggins v. Southern Ry.*, 64 S. C. 321, 42 S. E. 163 (1902).

34. *Booth v. Hanley*, 2 C. & P. 288 (1826); plaintiff "was turning up to the wall for a particular occasion;" *Hardy v. Murphy*, 1 Esp. 294 (1795), plaintiff "was noisy in a public street;" *Wooding v. Oxley*, 9 C. & P. 1 (1839), plaintiff cried, "hear, hear," and asked questions of the speaker, in a public meeting; *Palmer v. Maine C. Ry.*, 92 Me. 399, 42 At. 800, 44 L. R. A. 673, 69 Am. St. R. 513 (1899), plaintiff charged with fraudulently evading the payment of his fare; *Boylston v. Kerr*, 2 Daly (N. Y.) 220 (1867), plaintiff fraudulently substituted a smaller check for the one first delivered; *Kurtz v. Moffit*, 115 U. S. 487, 6 Sup. Ct. 148 (1885), a State

peace officer has no right to arrest a deserter from the Federal army, as the latter's offense is a breach of the military law, not a felony or breach of the peace. Common law felony defined at p. 499.

35. *Wahl v. Walton*, 30 Minn. 506 (1883); New York Code of Criminal Procedure, § 177 (1); *Claiborne v. Chesapeake & O. Ry.*, 46 W. Va. 363, 33 S. E. 262 (1899), plaintiff carried on his person an open knife, a bottle of whiskey and a razor — "a deadly combination." in the opinion of the court, as well as a public offense under a statute.

36. *Beckwith v. Philby*, 6 B. & C. 635 (1827); *Samuel v. Payne*, 1 Doug. 359 (1780); *Miles v. Weston*, 60 Ill. 361 (1871); *Doering v. State*, 49 Ind. 56, 19 Am. R. 669 (1874); *Burke v. Bell*, 36 Me. 317 (1853); *Palmer v. Maine C. Ry.*, 92 Me. 399, 42 At. 800, 44 L. R. A. 673, 69 Am. S. R. 513 (1899); *State v. Grant*, 76 Mo. 236 (1882); *Burns v. Erben*, 40 N. Y. 463 (1869); *Neal v. Joyner*, 89 N. C. 287

authority in this respect to cases where a felony has in fact been committed.

At common law, even a peace officer is not justified in arresting without a warrant, upon suspicion of a misdemeanor,³⁸ nor for a misdemeanor which was not committed in his presence.³⁹

The liability of executive and military officers for the arrest and imprisonment of persons in case of riot or insurrection is considered in the cases noted below.^{39a}

282. (b) Arrest by a Private Person. The common law authorizes a private person to arrest without a warrant one who is breaking the peace in his presence, or whose conduct shows that the peace is likely to be broken by him.⁴⁰ Some modern statutes authorize such arrest for any crime committed or attempted in the presence of the one making the arrest.⁴¹ He is also justified in arresting without a warrant one who, he has probable cause to believe, has committed a felony.⁴² His position differs from that of a peace officer, in that he is liable for false imprisonment, if no felony has been committed, though he had probable cause to be-

(1883); *McCarthy v. De Armit*, 99 Pa. 63 (1881). field, 133 Mich. 463, 95 N. W. 532 (1903). Plaintiff was arrested by a

37. See New York Code of Crim. Proc., § 177 (3). deputy sheriff at one place, under the direction of defendant, who had the

38. *Palmer v. Maine Cen. Ry.*, 92 Me. 399, 42 At. 800, 44 L. R. A. 673, held a false imprisonment.

69 Am. S. R. 513 (1899); *Comm. v. Carey*, 12 Cus. (Mass.) 246 (1853); **39a.** *Moyer v. Peabody*, 212 U. S. 78, 29 Sup. Ct. 235 (1909); *Re Moyer*, 35 Colo. 159, 85 Pac. 190, 12 L. R. A., *Comm. v. McLaughlin*, 12 Cush. (Mass.) 615 (1853); *Ross v. Leggett*, N. S. 979, 117 Am. St. R. 189 (1904); 61 Mich. 445, 28 N. W. 695 (1886); *Franks v. Smith*, 142 Ky. 232, 134 S. W. 484 (1911).

Danovan v. Jones, 36 N. H. 246 (1858); *Thomas v. Turck*, 94 N. Y. 90 (1883); *Snead v. Bonnoil*, 166 N. Y. 245, 59 N. E. 899 (1901); *San Antonio, Etc. Ry. v. Griffin*, 29 Tex. Civ. App. 91, 48 S. E. 542 (1898). **40.** *Timothy v. Simpson*, 1 C. M. & R. 757, 6 C. & P. 499, 5 Tyr. 244 (1835); *Palmer v. Maine C. Ry.*, 92 Me. 399 (1899).

39. *Gaillard v. Laxton*, 2 B. & S. 363, 31 L. J. M. C. 123 (1862). In **41.** New York Code of Crim. Proc., § 183 (1).

this case the officer did not have the warrant with him, when making the arrest, and was held liable for false imprisonment: *McCullough v. Green-* **42.** *Hancock v. Baker*, 2 Bos. & P. 260 (1800). "It is lawful for a private person to do anything to prevent the perpetration of a felony."

lieve it had been committed.⁴³ His justification has been narrowed still more in some States, and his right to arrest without warrant for offenses not committed or attempted in his presence, has been limited to persons who have actually committed a felony.⁴⁴

A private detective or special constable comes within the doctrine of this paragraph.^{44a}

283. Reasonable and Probable Cause. It has been said by eminent judges,⁴⁵ that whether probable cause exists for believing a felony to have been committed, or that the person arrested committed it, is a question of fact for the jury. In England, however, it is well settled that this is a question for the court;⁴⁶ and the weight of authority in this country is to the same effect.⁴⁷ Probable cause has been defined as "a state of facts actually existing, known to the prosecutor personally or by information derived from others, which would lead a reasonable man of ordinary caution, acting conscientiously upon these facts, to believe a person guilty of an offense justifying his arrest."⁴⁸ While these facts are to be considered from the standpoint of the person making the arrest, and not from that of the arrested one,⁴⁹ the burden is on the former to show that he had reasonable and probable cause for his belief.⁵⁰

43. *Samuel v. Payne*, 1 Doug. 359 378, 21 L. J. Q. B. 266 (1852); *Lister* (1780); *Garnier v. Squiers*, 62 Kan. v. *Perryman*, L. R. 4 H. L. 521, 39 L. 321; 62 Pac. 1005 (1900); *Begley v. J. Ex.* 177 (1870).

Comm. (Ky.), 60 S. W. 847 (1901); **47.** *Filer v. Smith*, 96 Mich. 347, 55 Phillips v. Trull, 11 Johns. (N. Y.) N. W. 999 (1893); *Burns v. Erben*, 40 486 (1814); *Burns v. Erben*, 40 N. N. Y. 463 (1869); *McCarthy v. De Y.* 463 (1869); *Alabama, Etc. Ry. v. Armit*, 99 Pa. 63 (1881); *Wolf v. Kuhn*, 78 Miss. 114, 28 So. 797 (1900). *Perryman*, 82 Tex. 112, 17 S. W. 772

44. *New York Code of Crim. Proc.*, (1891); *Vinal v. Core*, 18 W. Va. 2 § 183 (2). (1881).

44a. *Lambert v. Great Eastern Ry.* **48.** *Clairborne v. Ches. & O. Ry.*, 46 (1909), 2 K. B. 776, 79 L. J. K. B. 32; W. Va. 363, 33 S. E. 262 (1899); cf. *Taylor v. N. Y. & L. B. Ry.*, 80 N. J. L. Rich v. McInerney, 103 Ala. 345, 15 282, 78 At. 169 (1910). So. 663, 49 Am. St. R. 32 (1894).

45. *Lord Tenterden in Beckwith v. Philby*, 6 B. & C. 635 (1827); *Gray*, 289, 21 S. E. 729 (1895); cf. *McJ.*, in *Sned v. Bonnoil*, 166 N. Y. 245, *Carthy v. De Armit*, 99 Pa. 63 (1881). 59 N. E. 899 (1901).

50. *Jackson v. Knowlton*, 173 Mass.

46. *Broughton v. Jackson*, 18 Q. B. 97, 53 N. E. 134 (1899).

290. Unreasonable Detention of a Person Arrested. An officer arresting a person with or without a warrant, or a private individual arresting without a warrant, is not allowed to imprison the suspected criminal indefinitely. Where the arrest is made without a warrant, it is the duty of the one arresting to take the other party before a magistrate, without unnecessary delay, in order that a judicial examination may be had, for the purpose of determining whether a warrant shall issue, or the prisoner be discharged.⁵¹ "The value of personal liberty is too great to permit the detention of a suspected fugitive, upon the judgment of a ministerial officer and without a hearing judicial in its character."⁵² Even where the arrest is made under a warrant, the officer must take the prisoner, without any unnecessary delay, before the magistrate issuing it, in order that the party may have a speedy examination, if he desires it.⁵³ When any considerable delay ensues, the burden is upon the officer to show that it was reasonably necessary.⁵⁴

291. Detentions Which Are Not False Imprisonments. The most frequent examples of this class are the temporary detention of pupils as a matter of lawful school discipline,⁵⁵ and acts done in behalf of those who are incompetent to take care of themselves, by reason of physical injury,⁵⁶ or sudden sickness, or drunkenness, or

⁵¹ Wright v. Court, 4 B. & C. 596, Anderson v. Beck, 64 Miss. 113 6 D. & R. 623 (1825); Hall v. Booth, (1886); Francisco v. State, 24 N. J. 3 N. & M. 316 (1834); Marsh v. Wise, L. 30 (1853).

⁵² 2 F. & F. 51 (1860); Lavina v. State, ⁵⁴ Tubbs v. Tukey, 3 Cush. (57 63 Ga. 513 (1879); Harness v. Steele, Mass.) 438, 50 Am. Dec. 744 (1849); 159 Ind. 286, 64 N. E. 875 (1902); Wiltse v. Holt, 95 Ind. 469 (1884). Brock v. Stimson, 108 Mass. 520, 11 The delay was caused by the arrested Am. R. 390 (1871); Twilley v. Perkins, 77 Md. 252, 26 At. 286, 39 Am. 65 Vt. 582, 27 At. 194 (1893). The St. R. 408, 19 L. R. A. 632 (1893); delay was due to the fact that the Linnen v. Banfield, 114 Mich. 93, 72 court, to which the warrant was returnable, was not in session; Venable N. W. 1 (1897); Green v. Kennedy, 48 v. Huddy, 77 N. J. L. 351, 72 At. 10 N. Y. 653 (1871); Leger v. Warren, (1909). Delay due to temporary absence of magistrate from his office. 62 Ohio St. 500, 57 N. E. 506, 78 Am. St. R. 738 (1900).

⁵³ Simmons v. Van Dyke, 138 Ind. ⁵⁵ Fertich v. Michener, 111 Ind. 380, 37 N. E. 973, 26 L. R. A. 33, 46 473, 485, 60 Am. R. 709 (1887). Am. St. R. 411 (1894).

⁵⁶ Olle v. Pittsburgh, Etc. Ry., 201 Pa. 361, 50 At. 1011 (1902).

insanity.⁵⁷ The right to restrain the liberty of an insane person, in the absence of a statute,⁵⁸ however, depends upon the character of the insanity. If he is harmlessly insane he may not be interfered with; but if his lunacy makes him dangerous to himself or others, he may be confined,⁵⁹ although such restraint ought to be followed by judicial proceedings in which a proper order or judgment for confinement may be obtained.

§ 3. MALICIOUS PROSECUTION.

292. The Nature of This Tort. Blackstone treats it as a species of defamation. His statement is: "A third way of destroying or injuring a man's reputation is by preferring malicious indictments or prosecutions against him, which, under the mask of justice and public spirit, are sometimes made the engines of private spite and enmity."⁶⁰ The gist of these actions for malicious prosecution is generally acknowledged to be an invasion of the personal rights of the plaintiff, rather than an injury to his property interests;⁶¹ and in most cases, complaint is not made of injury to reputation, but rather of the invasion of one's right of personal liberty.

Indeed, it often happens that the plaintiff has his option of suing either for false imprisonment or for malicious prosecution.⁶² If, however, his arrest was made under process valid in form and issued by a competent court upon sufficient complaint, he cannot

⁵⁷. *Porter v. Ritch*, 70 Conn. 235, 39 At. 169, 39 L. R. A. 353 (1898); *Colby v. Jackson*, 12 N. H. 526 (1842).

⁵⁸. See *Washer v. Slater*, 67 App. Div. 385, 73 N. Y. Supp. 425 (1901), construing New York Insanity Law, ch. 545, L. 1896.

⁵⁹. *Porter v. Ritch*, 70 Conn. 235; *Matter of Oakes*, 8 L. Reporter (Mass.) 122 (1845); *Look v. Dean*, 108 Mass. 116, 11 Am. R. 323 (1871); *Van Deusen v. Newcomer*, 40 Mich. 90 (1879); *Wheal v. W. R.*, Y. B. 22 Ed. IV, f. 45, pl. 10 (1483).

⁶⁰. Blackstone's Commentaries, Vol. III, p. 126.

⁶¹. *Lawrence v. Martin*, 22 Cal. 174 (1863); *Francis v. Burnett*, 84 Ky. 23, 35 (1886); *Nettleton v. Dinehart*, 5 Cush. (59 Mass.) 543 (1850); *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459 (1901); *Noonan v. Orton*, 34 Wis. 259, 17 Am. R. 441 (1874). "The personal injury is the gravamen of the action, and the effect of the alleged malicious acts of the defendant upon the estate of the plaintiff is incidental merely."

⁶². *Apgar v. Woolston*, 43 N. J. L. 57 (1881).

sue for false imprisonment. His action, if any, is for malicious prosecution.⁶³

293. The Essential Elements of the Tort. A person, who brings his action for this wrong, must prove four things: first, that the prosecution complained of has terminated in his favor; second, that it was instituted maliciously; third, that it was brought without probable cause, and, fourth, that it caused him damage. If he fails to prove either of these propositions he fails in his suit. The burden of proof is upon him, although "such proof must necessarily be of a negative, and concerning facts which are principally within the knowledge of the defendant."^{63a}

294. Termination in His Favor. The reason for this requirement, given in one of the earliest cases,⁶⁴ and repeated in later decisions,⁶⁵ is that "it cannot be known until the action is terminated that it was unjust." It has also been declared that if this requirement did not exist "almost every case would have to be tried over again upon its merits."⁶⁶

Whether a prosecution has been terminated is not a difficult question ordinarily. The true test to be applied is: has the particular prosecution been "disposed of in such a manner that it cannot be revived, and the prosecutor, if he intends to proceed further, must institute proceedings *de novo*?"⁶⁷ It is not necessary that the prosecution be concluded by a trial upon the merits, although this has been declared essential by an eminent judge.⁶⁸ Accordingly "a criminal prosecution may be said to have terminated: (1)

^{63.} Whitten v. Bennett, 86 Fed. 405 P. 684, 36 L. J. M. C. 93 (1867); Frisbie v. Morris, 75 Conn. 637, 55 At. 9 (1898); Black v. Buckingham, 174 Mass. 102, 54 N. E. 494 (1899); Marks v. Townsend, 97 N. Y. 590 (1885). 27 N. E. 772, 12 L. R. A. 288 (1891);

^{63a.} Brown v. Selfridge, 224 U. S. 189, 32 Sup. Ct. 444 (1912). Douglas v. Allen, 56 Ohio St. 156, 46 N. E. 707 (1897).

^{64.} Year Book, 2 Rich. III, Pl. 9 (1484).

^{67.} Apgar v. Woolston, 43 N. J. L. 57, 66 (1881).

^{65.} Waterer v. Freeman, Hob. 267 (1620); Smith v. Cranshaw, W. Jones 93 (1625); Parker v. Langley, 10 Mod. 210 (1714); Fisher v. Bristow, 1 Doug. 215 (1779).

^{68.} Shaw, C. J., in Parker v. Farley, 10 Cush. (64 Mass.) 279 (1852). This view has been modified by later cases in that state. Cf. Graves v. Dawson, 133 Mass. 419 (1882).

^{66.} Basebe v. Matthews, L. R. 2 C.

Where there is a verdict of not guilty; (2) where the grand jury ignore the bill; (3) where a *nolle prosequi* is entered, and (4) where the accused has been discharged from bail and imprisonment.”⁶⁹ If the prosecution be one in which the victim has no opportunity to contest the complaint and obtain a decision, the rule requiring a termination in his favor does not apply.⁷⁰ A voluntary abandonment of the original prosecution, with its formal dismissal on that account, is a termination thereof in the victim’s favor; but if its dismissal is due to a compromise, the action cannot be said to have terminated in his favor. This is upon the ground that “the termination must be such as to furnish *prima facie* evidence that the action was without foundation.” Where there is a compromise, the termination does not furnish evidence that the prosecution was improperly instituted, but indicates that the one prosecuted is in the position of admitting that his antagonist had probable cause for his proceeding.⁷¹

295. Malice. This term in its present connection means something more than “the intentional doing of a wrongful act to the injury of another, without justification or legal excuse therefor.”⁷² It means malice in fact, as distinguished from malice in law. It means that the conduct of the original prosecutor was actuated by

⁶⁹. *Lowe v. Wartman*, 47 N. J. L. 413, 1 At. 489 (1885); *Brown v. Randall*, 36 Conn. 56, 4 Am. R. 35 (1869); *Hatch v. Cohen*, 84 N. C. 602, 37 Am. R. 630 (1881); *Douglas v. Allen*, 56 Ohio St. 156, 46 N. E. 707 (1897); *Driggs v. Burton*, 44 Vt. 124 (1871); *Rider v. Kite*, 61 N. J. L. 8, 38 At. 754 (1897); *Craig v. Ginn*, 3 Penne. (Del.) 117, 48 At. 192, 94 Am. St. R. 77 (1901).

⁷⁰. *Steward v. Gromett*, 7 C. B. N. S. 191, 29 L. J. C. P. 170 (1859); *Hyde v. Greuch*, 62 Md. 577 (1884); *Bump v. Betts*, 19 Wend. 421 (1838).

In the first two cases, the malicious proceeding was an *ex parte* application for arrest of the plaintiff, and an order that he give sureties to

keep the peace. In the last, there was a malicious attachment of property, with no opportunity to defend.

⁷¹. *Wilkinson v. Howell*, Moo. & Mal. 495 (1830); *Marks v. Gray*, 42 Me. 86 (1856); *Sartwell v. Parker*, 141 Mass. 405, 5 N. E. 807 (1886); *Rachelman v. Skinner*, 46 Minn. 196, 48 N. W. 776 (1891); *McCormick v. Sisson*, 7 Cow. 715 (1827); *Mayer v. Walter*, 64 Pa. 283 (1870); *Russell v. Morgan*, 24 R. I. 134, 52 At. 809 (1902); *Craig v. Ginn*, 3 Penne. (Del.) 117, 48 At. 192, 94 Am. St. R. 77 (1901).

⁷². *Ahrens & Ott. Mfg. Co. v. Hoehner*, 106 Ky. 692; 51 S. W. 194 (1899); *Vanderbilt v. Mathis*, 5 Duer (N. Y.) 559 (1856).

some "improper or sinister motive;" ⁷³ that he instituted the prosecution not "with the mere intention of carrying the law into effect, but with an intention which was wrongful in point of fact," ⁷⁴ that he did this "from an indirect and improper motive, and not in furtherance of justice." ⁷⁵

On the other hand, the term is not to be understood in its popular signification. The plaintiff is not bound to show that the defendant acted from motives of resentment, or ill-will or hatred towards him. ⁷⁶ He establishes malice by showing that the defendant procured the warrant to be issued by making an intentionally false affidavit; ⁷⁷ or that, having the opportunity of discovering the facts, he failed to take advantage of it, and recklessly or with culpable negligence instituted the prosecution. ⁷⁸ Express evidence of malice need not be given. It may be established by circumstantial evidence, and is generally proved in this way. It may be inferred by the jury from a want of probable cause. But its "existence is always a question exclusively for the jury," ⁷⁹ although when the

⁷³ *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116 (1878). *ford v. Dietrich*, 93 Ala. 565, 9 So. 308, 30 Am. St. R. 79 (1890); *Boze-*

⁷⁴ *Abrath v. North E. Ry.*, 11 Q. B. D. 440, 448-9, 52 L. J. Q. B. 620 (1883). *man v. Shaw*, 37 Ark. 160 (1881); *Harkrader v. Moore*, 44 Cal. 144 (1872); *Porter v. White*, 5 Mackey (16 Dis. Col.) 180 (1886); *Harp-*

⁷⁵ *Ibid*, p. 455.

⁷⁶ *Mitchell v. Jenkins*, 5 B. & A. 588, 15 L. J. Q. B. 221 (1833); *Pullen v. Glidden*, 66 Me. 202 (1877); *Wiggin v. Coffin*, 3 Story 1, Fed. Cas. No. 17,204 (1836). *ham v. Whitney*, 77 Ill. 32 (1875); *Newell v. Downs*, 8 Blackf. (Ind.) 523 (1847); *Parker v. Parker*, 102 Ia. 500, 71 N. W. 421 (1897); *Atchison Co. v. Watson*, 37 Kan. 773, (1887); *Medcalfe v. Brooklyn Co.*, 45 Md. 198 (1876); *Greenwade v. Mills*, 31 Miss. 464 (1856); *Johnson v. Chambers*, 10 Iredell (32 N. C.) 287 (1849); *Gee v. Culver*, 12 Or. 228, 11 Pac. 302 (1885); *Cooper v. Hart*, 147 Pa. 595, 23 At. 833 (1892); *Caldwell v. Bennett*, 22 S. C. 1 (1884); *Evans v. Thompson*, 12 Helsk. (Tenn.) 534 (1873); *Barron v. Mason*, 31 Vt. 189 (1858); *Forbes v. Hagman*, 75 Va. 168 (1881).

⁷⁷ *Collins v. Love*, 7 Blackf. (Ind.), 416 (1845); *Navarino v. Dudrap*, 66 N. J. L. 620, 50 At. 353 (1901); *Dennis v. Ryan*, 63 Barb. 145 (1872); S. C. 65 N. Y. 385, 22 Am. R. 635 (1875).

⁷⁸ *Hamilton v. Smith*, 39 Mich. 222 (1878); *Stubbs v. Mullholland*, 168 Mo. 47, 67 S. W. 650 (1902).

⁷⁹ *Stewart v. Sonneborn*, 98 U. S. 187 (1878); *Wheeler v. Nesbit*, 24 How. (U. S.) 545 (1860); *Johnson v. Eberts*, 11 Fed. 129 (1880); *Luns-*

plaintiff's evidence fails to make a *prima facie* case of malice, the court should non-suit him.⁸⁰

296. Probable Cause. This term has been defined as "such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably and without prejudice upon the facts within his knowledge, to believe that the person accused is guilty,"⁸¹ or, if the prosecution is a civil suit, to believe "that he had a cause of action"⁸² against the one whom he prosecutes. Some courts have declared that the facts and circumstances should be such as would convince a "cautious" man that there was good ground for the prosecution;⁸³ but the weight of authority is in favor of the statement contained in the definition quoted above.⁸⁴ While the law tends to discourage unreasonable invasions of personal rights, it has regard also for the public welfare and for the interests of those who have been wronged. If the test of probable cause is made too strict and severe, persons will be discouraged from setting the wheels of justice in motion.⁸⁵

The question of probable cause is one for the court and not for the jury.⁸⁶ Only by reserving it for the court, can anything like certainty as to what constitutes probable cause be obtained. Of course, if the evidence is conflicting, or, if different inferences

80. *Lauterbach v. Netzo*, 111 Wis. 627 (1902); *McClafferty v. Philp*, 326, 87 N. W. 230 (1901). 151 Pa. 86, 24 At. 1042 (1892); *Eg-*

81. *Heyne v. Blair*, 62 N. Y. 19, 22 (1875); *Bacon v. Towne*, 4 Cush. W. 556 (1900).

(58 Mass.) 217 (1849); *Kansas, etc., Co. v. Galloway*, 71 Ark. 351, 74 S. W. 521 (1903). 85. *Allen v. Flood* (1898), A. C. 1, 125, 172, 67 L. J. Q. B. 119, 185, 209; *Munns v. Dupont*, 3 Wash. C. C. 31,

82. *Ravenga v. Mackintosh*, 2 B. Fed. Cas. No. 9,926 (1811). & C. 693 (1824).

83. *Munns v. Dupont*, 3 Wash. C. 106 Ky. 692, 51 S. W. 194 (1899); C. 31, Fed. Cas. No. 9,926 (1811); *Bank of Miller v. Richmon*, 64 Neb. 111, 89 N. W. 627 (1902); *Jones v. Richey v. McBean*, 16 Ill. 63 (1855); 111, 89 N. W. 627 (1902); *Jones v. Cole v. Curtis*, 16 Minn. 181 (1870); *Wilmington, etc., Ry.*, 125 N. C. 227, 34 S. E. 398 (1899); *Brown v. Self-*

84. *Flam v. Lee*, 116 Ia. 289, 90 N. W. 70 (1902); *Bank of Miller v. Richmon*, 64 Neb. 111, 89 N. W. ridge, 224 U. S. 189, 32 Sup. Ct. 444 (1912).

may be drawn by reasonable men from uncontradicted evidence, the jury are to determine the facts, or to state their inferences.⁸⁷

297. **Success or Failure of Original Prosecution.** If the termination of the original prosecution was in favor of the prosecutor, and the decision has not been reversed, it furnishes conclusive proof of probable cause for the prosecution.⁸⁸ When it has been reversed for legal error, but it is not shown to have been procured by fraud or other unlawful means, the weight of authority is in favor of treating it as still conclusive on the question of probable cause.⁸⁹ Indeed, a few courts refuse to inquire, in the suit for malicious prosecution, how the termination of the original proceeding was secured, if it was adverse to the present plaintiff.⁹⁰ On the other hand, it has been declared that the true principle to be applied is this: "A conviction is always *prima facie* evidence of the existence of probable cause; but this is a rule of evidence, founded upon the fact that, ordinarily, if a court has proceeded to conviction, it must have had before it such evidence as in the mind of a prudent and reasonable man would convince him of the guilt of the accused; and, therefore, a subsequent reversal, while it may show that the accused was in fact innocent, does not show that there was no probable cause for believing him guilty. Where, however, the conviction is under such circumstances as to deprive it of such naturally evidentiary effect, this presumption ceases."⁹¹

87. *Wiggin v. Coffin*, 3 Story, 1, (1896); *Cloon v. Gerry*, 13 Gray (79 Fed. Cas. No. 17,264 (1836)); *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 708 (1888); *Johnson v. Miller*, 63 Am. Dec. 422 (1837).

Ia. 529, 50 Am. R. 758 (1884).

88. *Hartshorn v. Smith*, 104 Ga. 235, 30 S. E. 666 (1898); *Foster v. Orr*, 17 Or. 447, 21 Pac. 440 (1889); *Swepson v. Davis*, 109 Tenn. 99, 70 S. W. 65, 59 L. R. A. 501 (1902).

89. *Crescent City Co. v. Butchers' Union*, 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614 (1886); *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703 (1898); *Adams v. Bicknell*, 126 Ind. 210, 25 N. E. 804, 22 Am. S. R. 576 (1890); *Morrow v. Wheeler, etc.*, Co., 165 Mass. 349, 43 N. E. 105

90. *Clements v. Odorless & Co.*,

67 Md. 461, 10 At. 442, 1 Am. S. R. 409 (1887); *Parker v. Huntington*, 7 Gray (73 Mass.) 36, 66 Am. Dec. 455 (1856); *Griffis v. Sellars*, 4 Dev. & B. L. (20 N. C.) 177 (1838); *Her-*

man v. Brookerhoff, 8 Watts (Pa.), 240 (1839). In *Griffis v. Sellars* it is said, that were the rule otherwise, "the result would be interminable litigation between the parties, alternately changing sides."

91. *Nehr v. Dobbs*, 47 Neb. 863, 869, 66 N. W. 864 (1891).

The failure of the original prosecution is not conclusive evidence of a want of probable cause. Whether the prosecutor had such cause does not turn upon the actual guilt of the accused, or the state of the case, but upon the honest and reasonable belief of the prosecutor.⁹² In most jurisdictions, the failure of the prosecution, while a fact which the plaintiff must establish in order to make out his case, is not evidence tending to show the want of probable cause.⁹³ In other jurisdictions, it is deemed evidence of a want of probable cause, but does not shift the burden of proof to the defendant.⁹⁴ In still others, it is held to make out a *prima facie* case, and casts upon the defendant the burden of showing that he had probable cause.⁹⁵

The holding of an accused person by a committing magistrate, as well as the finding of an indictment by a grand jury, is generally accounted evidence of probable cause;⁹⁶ and his discharge upon a preliminary examination, is treated by some courts as evidence of a want of probable cause.⁹⁷

298. Advice of Counsel as Evidence of Probable Cause. "Nothing is better settled," an eminent court has declared, "than that when the prosecutor submits the facts to his attorney, who advises they are sufficient, and he acts thereon in good faith, such advice is a defense to an action for malicious prosecution."⁹⁸

⁹². *Foshay v. Ferguson*, 2 Den. 114 Wis. 24, 89 N. W. 900 (1902). (N. Y.) 617 (1846).

⁹³. *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116 (1878); *Thompson v. Rubber Co.*, 56 Conn. 493, 16 At. 554 (1888); *Anderson v. Friend*, 85 Ill. 135 (1877); *Philpot v. Lucas*, 101 Ia. 478, 70 N. W. 625 (1897); *Stone v. Crocker*, 24 Pick. (41 Mass.) 81 (1832); *Boeger v. Langenberg*, 97 Mo. 390, 11 S. W. 223, 10 Am. S. R. 322 (1888); *Apgar v. Woolston*, 43 N. J. L. 57 (1881); *Willard v. Holmes*, 142 N. Y. 492, 37 N. E. 480 (1894); *Eastman v. Monastes*, 32 Or. 291, 51 Pac. 1095, 67 Am. St. R. 531 (1898); *Bekke-land v. Lyons*, 96 Tex. 255, 72 S. W. 56 (1903); *Cullen v. Hanisch*, 114 Wis. 24, 89 N. W. 900 (1902).

⁹⁴. *Rankin v. Crane*, 104 Mich. 6, 61 N. W. 1007 (1895); *Noblett v. Bartsch*, 31 Wash. 24, 71 Pac. 551 (1903); *Venal v. Core*, 18 W. Va. 1 (1881).

⁹⁵. *Barhight v. Tammany*, 158 Pa. 545, 28 At. 135, 38 Am. S. R. 853 (1893).

⁹⁶. *Ross v. Hixon*, 46 Kan. 550, 26 Pac. 955, 26 Am. S. R. 123 (1891), with valuable note; *Perkins v. Spaulding*, 182 Mass. 218, 65 N. E. 72 (1903).

⁹⁷. *Stemper v. Raymond*, 38 Or. 16, 62 Pac. 20 (1900).

⁹⁸. *McClaferty v. Philp*, 151 Pa. 86, 24 At. 1042 (1892). Accord.; *Stewart v. Sonneborn*, 98 U. S. 187,

Notwithstanding this unqualified declaration, several courts of equal eminence have held that the advice of a duly qualified attorney, based upon an unfounded or clearly erroneous opinion of the rule of law involved, does not constitute a defense.⁹⁹ "Probable cause," say these courts, "may be founded on misinformation as to the facts, but not as to the law."¹⁰⁰ This view seems indefensible. Undoubtedly, the blunder of counsel may be so gross as to show bad faith on his part;¹ but, to quote the language of a distinguished judge: "though every man being bound to know the law, is answerable for the legal consequences of his acts, the imputation of a motive which had no existence in fact is not one of them."²

299. In order that the advice of counsel may establish the existence of probable cause and thus constitute a defense, the defendant must show that he made a full and honest disclosure of all the material facts within his knowledge and belief.³ He cannot screen himself behind expert legal advice based upon a fragmentary statement of facts, nor upon such advice, when, notwithstanding it has been given, he does not believe that his claim or charge is well founded.⁴

25 L. Ed. 116 (1878); *Marks v. Hastings*, 101 Ala. 165, 173, 13 So. 297 (1892); *Kansas, etc., Co. v. Galloway*, 71 Ark. 351, 74 S. W. 521 (1903); *Black v. Buckingham*, 174 Mass. 102, 54 N. E. 494 (1899).

3. *Black v. Buckingham*, 174 Mass. 102, 54 N. E. 494 (1899).

4. *Marks v. Hastings*, 101 Ala. 165, 13 So. 297 (1892); *Kansas, etc., Co. v. Galloway*, 71 Ark. 351, 74 S. W. 521 (1903); *Vann v. McCreary*, 77 Cal. 434, 19 Pac. 826 (1888);

99. *Lange v. Ill. Cen. Ry.*, 107 La. 687, 31 So. 1003 (1902); *Nehr v. Dobbs*, 47 Neb. 863, 66 N. W. 864 (1896); *Hazzard v. Fluny*, 120 N. Y. 223, 24 N. E. 194 (1890); *Morgan v. Duffy*, 94 Tenn. 686, 30 S. W. 735 (1845); *Mauldin v. Ball*, 104 Tenn. 597, 58 S. W. 248 (1900).

100. *Hazzard v. Fluny*, 120 N. Y. 223, 227, 24 N. E. 194 (1890).

1. *Smith v. King*, 62 Conn. 515, 26 At. 1059 (1893).

2. *Gibson, C. J., in Herman v. Brookerhoff*, 8 Watts (Pa.), 240, 242 (1829).

B. & C. 693 (1824); *Hadrick v. Heslop*, 12 Q. B. 267, 17 L. J. Q. B. 313 (1848).

The defendant is bound to show, too, that the person giving the advice was a reasonably competent lawyer of good reputation.⁶ It is not enough that the adviser be a magistrate, or a layman accustomed to give counsel in legal matters.⁶ The attorney should not be biased by any personal interest in the affair;⁷ but the better view is that he is not disqualified by the fact that he is the defendant's regular counsel.⁸ The rule that professional legal "advice, honestly sought and acted upon, supplies the indispensable element of probable cause" has been judicially declared to originate "in the policy of the law to encourage prosecutions where there is probable cause, actual or constructive, and is founded on the theory that persons, who have made the law their study and followed it as a profession, are well recognized advisers on questions of law, and that the citizen is justified in relying and acting on their advice. The protecting power of the rule is limited to the advice of licensed attorneys in good standing, and of reputed learning and competency. It should not be extended beyond these limitations."⁹

When the defendant establishes the existence of probable cause for his prosecution of plaintiff, he is entitled to judgment, though his motive may have been ever so malicious, and though the prose-

5. *Murphy v. Larson*, 77 Ill. 172 (1875); *Stubbs v. Mulholland*, 168 Cal. 222, 28 Pac. 937, 27 Am. S. R. 174 (1892).

Mo. 47, 67 S. W. 651 (1902): "In this State, where a license to practice is obtained almost for the asking, it by no means follows, because a man has been licensed to practice law, that therefore he is qualified to give advice in a matter of such pith and moment as pertains to arresting a suspected man on a criminal charge."

6. *Burgett v. Burgett*, 43 Ind. 78 (1873); *Olmstead v. Partridge*, 16 Gray (82 Mass.) 381 (1860); *Beal v. Robson*, 8 Ired. L. (N. C.) 276 (1848); *Gee v. Culver*, 12 Or. 228, 6 Pac. 775 (1885); *Sutton v. McConnell*, 46 Wis. 269, 50 N. W. 414 (1879). Contra, *Ball v. Rawles*, 93

7. *White v. Carr*, 71 Me. 555, 36 Am. R. 533 (1880); *Perrenoud v. Helm*, 65 Neb. 77, 90 N. W. 980 (1902).

8. *Kansas, etc., Co. v. Galloway*, 71 Ark. 351, 74 S. W. 521 (1903). "the objection that he was interested as the attorney of the prosecutor, and, therefore, disqualified under the rule, is untenable, for any lawyer called upon to advise is the attorney for the party asking his advice."

9. *Marks v. Hastings*, 101 Ala. 165, 173, 13 So. 297 (1892). Cf. *Olmstead v. Partridge*, 16 Gray (82 Mass.), 381 (1860).

cution may have terminated in the present plaintiff's favor, and though the latter may have sustained damages.¹⁰

300. Legal Damage. The fourth element necessary to constitute a cause of action for malicious prosecution is legal damage to the plaintiff.

Such damage, said Chief Justice Holt more than two centuries ago, may be of three sorts, "any one of which is sufficient to support this action. First: damage to his fame, if the matter whereof he be accused be scandalous. Secondly: to his person, whereby he is imprisoned. Thirdly: to his property, whereby he is put to charges and expenses."¹¹

301. Damage to Reputation. The illustrations of this sort of damage, given by Lord Holt, are an indictment for barratry, though the indictment be erroneous or found *ignoramus*,¹² and an indictment of a justice of the peace for doing an act contrary to law.¹³ Modern illustrations are afforded by the malicious institution of proceedings in bankruptcy or insolvency,¹⁴ and for proceedings for inquisition of lunacy.¹⁵

302. Damage to Person. A criminal prosecution, even though it may not involve scandal to the reputation, subjects the accused to the possible loss of personal liberty, and therefore "necessarily and naturally" causes legal damage to him.¹⁶ Special damages

10. *Stewart v. Sonneborn*, 98 U. S. 674, 52 L. J. Q. B. 488 (1883); petition to wind up a company. 187, 25 L. Ed. 116 (1878); *Frisbie v. Morris*, 75 Conn. 637, 55 At. 9 (1903).

11. *Savill v. Roberts*, 12 Mod. 208, 5 Mod. 394, 405, 1 Ld. Raym. 374, 1 Salk. 13, 3 Salk. 16, Carth. 416 (1698).

12. *Barns v. Constantine*, Cro. Jac. 32, Yelv. 46 (1606).

13. *Henly v. Burnstall*, T. Raym. 180, 1 Vent. 23 (1681).

14. *Chapman v. Pickersgill*, 2 Wils. 145 (1762); *Metropolitan Bank v. Pooley*, 10 App. Cas. 210 (1885); *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116 (1878); *Quartz Hill, etc., Co. v. Eyre*, 11 Q. B. D. 498 (1886).

15. *Lockenour v. Sides*, 57 Ind. 360, 26 Am. R. 58 (1877); see *Wade v. Nat. Bank of Tacoma*, 114 Fed. 377 (1902). Injury to reputation done by allegations in the complaint, which injured the present plaintiff's reputation and business.

16. *Quartz Hill Co. v. Eyre*, 11 Q. B. D. 674, 52 L. J. Q. B. 488 (1883); *Rayson v. South London Co.* (1893), 2 Q. B. 304, 62 L. J. Q. B. 593; *Saxon v. Castle*, 6 A. & E. 652 (1837); *Cardinal v. Smith*, 109 Mass. 158, 12 Am. R. 682 (1872); *Emerson v. Cochran*, 111 Pa. 619, 4 At. 498 (1886).

need not be alleged nor proved. Indeed, most text writers and judges omit "legal damage" as a separate element in the cause of action for malicious prosecution, when the original proceeding is a criminal one. But it is submitted that legal damage is always an essential element of this cause of action, although the evidence which establishes the other elements will necessarily establish this, whenever the original prosecution deprives the defendant of personal liberty, or is carried on for the purpose of depriving him of his liberty.¹⁷

303. Damage to Property. A case of legal damage is made out, when the plaintiff shows that his property was attached or levied upon,¹⁸ or was interfered with under a search warrant,¹⁹ or his use or control of it was interrupted by an injunction,²⁰ or *lis pendens*,²¹ or a receivership,²² in proceedings maliciously instituted without probable cause, which have terminated in his favor. In the last cited case, the court said: "Any particular method of interfering with property rights, as by writ of attachment, is not material. An equitable levy upon property, as in garnishee proceedings, or the deprivation of the defendant of his property by means of the appointment of a receiver, or by any other means

17. *Byne v. Moore*, 5 Taunt. 187, 1 Marshall, 121 (1813), declares there must have been an imprisonment, or scandal to reputation; but the case has been criticised as not in accordance with modern law. Clerk and Lindsell, *Torts* (2d Ed.) 557. In *Goslin v. Wilcock*, 2 Wils. 302 (1766), Lord Camden said of an action for malicious arrest in a civil suit: "This action has been held to lie because the costs of the cause are not a satisfaction for imprisoning a man unjustly, and putting him to the difficulty of getting bail for a larger sum than is due."

18. *Redway v. McAndrew*, L. R. 9 Q. B. 74 (1873); *Spalds v. Barrett*, 57 Ill. 289, 11 Am. R. 19 (1870); *Western Co. v. Wilmarth*, 33 Kan. 510 (1885); *O'Brien v. Barry*, 106 Mass. 300, 8 Am. R. 329 (1871); *Fortman*

v. Rottler, 8 Ohio St. 548 (1858); *Tomlinson v. Warner*, 9 Ohio, 104 (1839); *Mayer v. Walter*, 64 Pa. 283 (1879).

19. *Cooper v. Booth*, 3 Esp. 135, 144 (1875); *Elsee v. Smith*, 2 Chitty, 304, 1 D. & R. 97 (1822); *Whitson v. May*, 71 Ind. 269 (1880); *Olson v. Tvette*, 46 Minn. 225, 48 N. W. 914 (1891); *Boeger v. Langenberg*, 97 Mo. 390, 11 S. W. 223, 10 Am. S. R. 322 (1888).

20. *Mitchell v. Southwestern Ry.*, 75 Ga. 398 (1885); *Newark Coal Co. v. Upson*, 40 Ohio St. 17 (1883).

21. *Smith v. Smith*, 56 How. Pr. (N. Y.) 316 (1878), s. c., *affd.* 20 Hun, 555 (1880).

22. *Luby v. Bennett*, 111 Wis. 613, 87 N. W. 804, 56 L. R. A. 261, 87 Am. S. R. 897 (1901).

whereby his property is taken into the custody of the court or taken out of the custody of the owner and out of his free control, which, in the ordinary course of things, causes damage not reached by a mere judgment of vindication or for costs, is sufficient."

304. Damage to Property Consisting in Charges and Expenses. In commenting on this species of damage, Chief Justice Holt said: "That a man put to answer an indictment is put to charges is notorious; and if so, it is an injury to his property; and if this injury be occasioned by a malicious prosecution, it is reason and justice he should have an action to repair him the injury."²³ Later in the same opinion, he notes a great difference between bringing an action maliciously and prosecuting an indictment maliciously. In the latter case, he says, the party maliciously prosecuted has no remedy for the charges to which he is put in defending himself, but that of his action for malicious prosecution. In the former, he declares, costs are given to the defendant as his security against troublesome actions, and these costs are in the stead of pledges required by ancient common law. His conclusion seems to be that one damaged, beyond his costs, by the malicious, groundless, and unsuccessful prosecution of a civil action cannot recover, unless he show that "the action was brought merely for vexation and oppression; but if he show any special matter whereby it appears to the court that it was frivolous and vexatious he shall have an action."²⁴

305. At present, the English courts refuse to entertain an action for the malicious prosecution of a civil suit, unless the special matter alleged as legal damage, consists in the arrest of the person, or in scandal to his business reputation, or in the wrongful interference with his property by attachment or other process. If the only pecuniary damage, which he can show, is the payment of charges and expenses over and above his taxable costs, he will fail. Such expenditures, it is declared, are not legally "necessary to the purposes of the party who has incurred them." "It may be quite reasonable as between the successful party and his solicitor that the extra costs should be paid to the solicitor; but it is unreasonable that the losing party should pay them, they not having been

²³. *Savill v. Roberts*, 12 Mod. 208, 209 (1698). ²⁴. *Ibid.* at p. 210.

caused by his litigation." As his litigation did not cause them, they cannot be deemed damages inflicted by him.²⁵

In the case last cited, Lord Justice Bowen declared: "It is unnecessary to say that there could not be an action for malicious prosecution in the past, and it is unnecessary to say that there may not be such an action in the future, although it cannot be found at the present day. The counsel for plaintiff company have argued this case with great ability; but they cannot point to a single instance, since Westminster Hall began to be the seat of justice, in which an ordinary action, similar to the actions of the present day, has been considered to justify a subsequent action on the ground that it was brought maliciously and without reasonable and probable cause."

306. American Courts Are Divided. Many courts in this country have approved and followed the English rule, stated in the last paragraph. They hold that the costs, which are allowed by statute, are the only penalty the law gives against a plaintiff for prosecuting a suit in a court of justice, in the regular and ordinary way, and which is not accompanied by the arrest of the person, or seizure of property, or other special injury not necessarily resulting in all suits prosecuted to recover for like causes of action. These tribunals express the opinion that to allow suits for malicious prosecution in such circumstances, would operate to deter an honest suitor from resorting to the courts for the ascertainment of his legal rights, through fear of being obliged to defend a subsequent suit charging him with malicious prosecution. They also insist that if the defendant may sue for extra costs and expenses incurred in defending against an unfounded prosecution, the plaintiff shall be allowed to bring an action when the defendant makes an unfounded defense.²⁶

²⁵ Brett, M. R., in *Quartz Hill v. Imlay*, 4 N. J. L. 330, 7 Am. Dec. Co. v. Eyre, 11 Q. B. D. 674, 682. 603 (1816); *Paul v. Fargo*, 84 App.

²⁶ *Mitchell v. Southwestern Ry.*, Div. 9, 82 N. Y. Supp. 369 (1903); 75 Ga. 398 (1885); *Smith v. Mich. Terry v. Davis*, 114 N. C. 31, 15 S. Buggy Co., 175 Ill. 619, 51 N. E. E. 943 (1894); *Cin. Trib. Co. v. 569*, 67 Am. S. R. 242 (1898); *Wet- Bruck*, 61 Ohio St. 489, 56 N. E. more v. Mellinger, 64 Ia. 741, 18 198, 76 Am. S. R. 433 (1900), distin- N. W. 870, 52 Am. R. 465 (1884); *guishing Pope v. Pollock*, 46 Ohio Supreme Lodge v. Unverzagt, 76 St. 367, 21 N. E. 356, 4 L. R. A. 255, Md. 104, 24 At. 323 (1892); *Potts* 15 Am. St. R. 608 (1889), as arising

On the other hand, many of our courts reject the English rule, and sustain a recovery for the malicious prosecution of a civil suit, even though not attended with the arrest of the person, or the seizure of property or wrongful interference with it. These tribunals declare that the taxable costs in most of our States are small, and are not intended by the legislature to afford full compensation, in cases which are maliciously instituted and are prosecuted without reasonable and probable cause. When a party groundlessly and maliciously sets in motion the formidable machinery of the law, say these courts, to harass and oppress his neighbor, he abuses legal process which was intended for parties acting in good faith, and his wrongdoing is of the same character with that of one who seizes property or interferes with its possession by its true owner. To refuse a remedy for such a wrong is to violate the rule of the common law that no legal injury shall go unredressed. This doctrine seems sound in principle and is gaining in favor.²⁷

In some of the cases, cited in the last note, the original prosecution was instituted in a justice's court, where no taxable costs are allowed, and the pecuniary injury to the original defendant was intentionally inflicted in bad faith. The injustice of the English rule in such cases is manifest.

from the malicious prosecution of (1884); Hoyt v. Macon, 2 Colo. 113 suits for forcible entry and de- (1873); Whipple v. Fuller, 11 Conn. tainer. "Judgments in such suits 582 (1836); Woods v. Fennell, 13 are not conclusive. The proceed- Bush (Ky.), 628 (1878); McCardle ing may be commenced and recom- v. McGinley, 86 Ind. 538, 44 Am. R. menced without limit, unless en- 343 (1882); Brand v. Hinchman, 68 joined, and hence affords an oppor- Mich. 590, 36 N. W. 664, 13 Am. S. tunity for the gratification of mal- R. 362 (1888); McPherson v. Run- ice and oppression, and, when this yon, 41 Minn. 524, 43 N. W. 392, is the case, an action may be main- 16 Am. St. R. 727 (1889); Smith tained by the injured party for the v. Burrus, 106 Mo. 94, 16 S. W. 881, recovery of damages." Muldoon v. 27 Am. S. R. 329 (1891); McCor- Rickey, 103 Pa. 110, 49 Am. R. 117 mick Co. v. Willan, 63 Neb. 391, 88 (1883); Johnson v. King, 64 Tex. N. W. 497, 93 Am. S. R. 449, with 226 (1885); Luby v. Bennett, 111 note (1901); Pangburn v. Bull, 1 Wis. 613, 87 N. W. 804, 87 Am. S. R. Wend. (N. Y.) 345 (1828); Kolka 897, 56 L. R. A. 261 (1901). v. Jones, 6 N. Dak. 461, 71 N. W.

27. Easton v. Bank of Stockton, 558, 66 Am. S. R. 615 (1897); Lipscomb v. Shofner, 96 Tenn. 112, 33

307. Compensatory and Punitive Damages. As malice on the part of the defendant is an essential element of the cause of action for malicious prosecution, it follows that the plaintiff, if entitled to recover at all, is not limited to compensatory damages, as a rule. Full compensation for obtaining sureties, in case of his arrest, and for the reasonable charges of his counsel, as well as other expenses caused by defendant's wrongful prosecution, should be given him. If his business has been injured, the harm thus suffered is a proper item of damages. Injury to feelings and reputation, indignity and humiliation, abuse by custodians for which the defendant is responsible, suffering due to the bad condition of the jail or other place of imprisonment, may be considered in assessing damages. And, in jurisdictions where punitive damages are allowed, the jury may take into account the wealth of the defendant as well as the character of his misconduct in fixing the sum which he must pay for his malicious prosecution of the plaintiff.²⁸

§ 4. MALICIOUS ABUSE OF PROCESS.

308. Differs from Malicious Prosecution. It is well settled that an action lies for the malicious abuse of lawful process, whether civil or criminal; but such action is not to be confounded with that for malicious prosecution, which we have been considering. If the process, which was abused, was that of arrest, the victim may sue for false imprisonment,²⁹ or, under the old forms

S. W. 818 (1896); *Closson v. Stason*, 161 Mass. 370, 37 N. E. 382, ples, 42 Vt. 209, 1 Am. R. 316 42 Am. S. R. 408 (1894); *Hlubek v.* (1869); *Wade v. Nat. Bank of Commerce*, 114 Fed. 377 (1902). *Pinske*, 84 Minn. 363, 87 N. W. 939 (1901); *Engleton v. Kabrich*, 66 Mo.

28. *Brown v. Master*, 111 Ala. App. 231 (1896); *Minn. Threshing* 397, 20 So. 344 (1895); *Foster v. Co. v. Regier*, 51 Neb. 402, 70 N. W. 934 (1897); *Friel v. Plumer*, 69 N. (1897); punitive damages not allowed against an innocent principal for the negligence of his agent; *H.* 498, 43 At. 618 (1899); *Abraham v. Cooper*, 81 Pa. 232 (1876); *Fenelon v. Butts*, 53 Wis. 344, 10 N. W. 501 (1881); *Porter v. Mack*, 10 N. W. 864 (1881); *Flam v. Lee*, 50 W. Va. 581, 40 S. E. 459 (1901). 116 Ia. 289, 90 N. W. 70, 93 Am. S. 29. *Holley v. Mix*, 3 Wend. (N. Y.) R. 242 (1902); *Spencer v. Cramblett*, 56 Ks. 794, 44 Pac. 985 (1896); 197, 29 At. 981 (1894); *Wood v. Drumm v. Cessnum*, 61 Ks. 467, 59 Graves, 144 Mass. 365, 11 N. E. 567 Pac. 1078 (1900); *Wheeler v. Han-* (1887).

of action, might bring a special action on the case.³⁰ If the process relates to property, as in the case of an attachment or execution, the party abusing it is remitted to the position of a trespasser *ab initio*, and may be proceeded against in an appropriate action of trespass.³¹ There is an abuse of process, where one person serves another with a subpoena, not to secure his attendance as a witness but "to coerce him into paying a debt through the alternative of being obliged to take a long journey" and leave his business.³²

When a plaintiff sues for malicious prosecution, he must allege and prove that the proceeding complained of was instituted without probable cause, and he must show that it terminated in his favor, save in a few exceptional cases.³³ But "in an action for the abuse of process, the *gravamen* of the complaint is the use of the process for a purpose not justified by law, and to effect an object not within its proper scope;" and the plaintiff is not bound to allege or prove want of probable cause, nor the termination of the original proceeding.³⁴

309. A peculiar form of abuse of process is found in cases where the person employing the process is entitled to use it, and the action, to which it is an incident, is properly brought and terminates or must terminate in his favor; but he uses it in a malicious or reckless way. In *Zinn v. Rice*,³⁵ the defendant was

30. *Grainger v. Hill*, 4 Bing. N. C. *White v. Ashley Co.*, 181 Mass. 339, 212 (1838); *Foy v. Barry*, 87 App. 63 N. E. 885 (1902); *Antcliff v. June*, Div. 291, 84 N. Y. Supp. 335 (1903). 81 Mich. 477, 45 N. W. 1019, 21 Am.

31. *Antcliff v. June*, 81 Mich. 477, St. R. 533 (1890); *Foy v. Barry*, 87 45 N. W. 1019 (1890); *Sneeden v. App. Div. 291*, 84 N. Y. Supp. 335 Harris, 109 N. C. 349, 13 S. E. 926 (1903).

(1891); *Murray v. Mace*, 41 Neb. 60, 59 N. W. 387 (1894). 35. 154 Mass. 1, 27 N. E. 772, 12

32. *Dishaw v. Wadleigh*, 15 App. Lidden, 130 Ala. 548, 30 So. 401 Div. 205, 44 N. Y. Supp. 207 (1897). (1901). In *Tisdale v. Major*, 100

33. *Supra*, ¶ 297; *Wood v. Graves*, Ia. 1, 75 N. W. 663 (1898), it was held that mental suffering and anguish, resulting from suing out a wrongful and malicious attachment, as auxiliary to a suit properly brought, do not constitute legal damage; and the case is distinguished from one for malicious prosecution.

34. *Zinn v. Rice*, 154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288 (1891);

sued for such a malicious abuse of process. In a contract action against the present plaintiff, to recover \$4,522.15, he laid his damages at \$40,000 and levied several attachments on real property of great value and on personal property worth \$100,000. "In the case at bar," said the court, "the grievance of the plaintiff is not that the defendant maliciously commenced a groundless suit. He admits that the plaintiff had a good cause of action, and that there is no defense to the suit, and that its termination cannot be in his favor. Nor is the grievance that the defendant abused the process in the former suit, and under color of it, did things not authorized by its terms. His grievance is that the defendant having a just cause of action, and a legal suit against the plaintiff, made an excessive attachment of property, which he knew was not needed as security for his debt, and for the purpose of injuring the plaintiff. If the plaintiff has any right of action, which is not controverted, it is idle to say that he must wait until the former action is terminated in his favor."

310. In *Bradshaw v. Frasier*,³⁶ the defendant executed a writ of removal, at a time when the plaintiff's intestate was sick with the measles. The judgment and writ were unassailable, and no specific provision of statute or rule of common law was violated by defendant; but it was alleged, and there was evidence tending to show that the intestate's death was caused by exposure due to defendant's pitiless conduct, in executing the writ while the intestate was too sick to be moved with safety. It was held that "the facts were sufficient to support a finding that there was an abuse of process."

It has been suggested that the wrong in these cases should be called *the malicious use of process*, as it is clearly distinguishable from the ordinary abuse of process.³⁷ The only objection to this proposal is, that the phrase, "malicious use of process" has long been employed by the courts as a synonym for malicious prosecution.³⁸

³⁶. 113 Ia. 579, 85 N. W. 752 40 Pac. 993 (1895); *Mayer v. Walter*, 64 Pa. 283 (1870); *Whitten v.*

³⁷. Editorial in 30 New York Law Journal, p. 528 (1903). *Doolittle's Executor*, 57 U. S. App. 145 (1898).

³⁸. *Wurmser v. Stone* (Ks. App.).

§ 5. WRONGS KINDRED TO MALICIOUS PROSECUTION.

311. **Bringing a suit in another's name**, if without authority from that other, is an actionable wrong. When the wrongdoer is sued therefor, it is unnecessary for the victim to allege want of probable cause or malice. The nominal plaintiff in the original suit may have had a perfect cause of action against the defendant, but that will not avail him who took the improper liberty of using the name of another in prosecuting a suit, by which the defendant was injured.³⁹ If the defendant was arrested, he has a clear case of legal damage.⁴⁰ If the nominal plaintiff is a pauper, or can exonerate himself from the payment of costs, the original defendant is entitled to full compensatory damages,⁴¹ and if the action was groundless and was prosecuted from malicious motives, punitive damages may be recovered.⁴² In case the nominal plaintiff is compelled to pay the costs, he can sustain a tort action against the wrongdoer.⁴³

312. **Maintenance**, as defined by Lord Coke, "is an unlawful upholding of the demandant or plaintiff, tenant or defendant, in a cause depending in suit, by word, writing, countenance or deed."⁴⁴ When a stranger intervenes in a pending litigation, either for the plaintiff or the defendant, even though he is free from actual malice and there is probable cause for instituting or defending the suit, he does an unlawful act, and he makes himself liable to the opposite party for all costs and expenses for the proceeding. Blackstone declares that the practice of maintenance was greatly encouraged by the first introduction of uses, and treats it as an offense against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. "A man may, however, maintain the suit," he adds, "of his near kinsman, servant, or poor neighbor,

39. *Thurston v. Ummons*, March, (1851); *Pechell v. Watson*, 8 M. & N. C. 47 (1840); *Foster v. Dow*, 29 W. 691 (1841).

Me. 442 (1849); *Bond v. Chapin*, 8 Met. (Mass.) 31 (1844); *Holliday v. Sterling*, 62 Mo. 321 (1876).

40. *Thurston v. Ummons*, March, (N. C.) 38 (1841).

41. *Moulton v. Lowe*, 32 Me. 466

42. *Bond v. Chapin*, 8 Met. (Mass.) 31 (1844).

43. *Metcalf v. Alley*, 2 Ired. L.

44. Inst. Vol. 2, p. 208.

out of charity and compassion, with impunity.”⁴⁵ This exception to the common law liability for maintenance has received recent judicial recognition.⁴⁶ It is also lawful for a person who has an interest in the subject matter of a litigation brought or defended by another, to contribute to its success.⁴⁷ But if he has not a common legal interest with such litigant, and cannot bring himself within the exception noted by Blackstone, he will be liable in tort for maintenance.⁴⁸ While an action for this wrong is rarely brought, modern decisions, both in England and in this country, show that it is maintainable.⁴⁹

45. Commentaries, Vol. 4, p. 135. *Fetcher v. Ellis*, Hemp. (U. S. Cir-

46. *Harris v. Brisco*, 17 Q. B. D. cult Ct.) 300, 9 Fed. Cas. No. 504, 55 L. J. Q. B. 423 (1886). 4,863a, (1836); *Goodyear Dental Co.*

47. *Guy v. Churchill*, 40 Ch. D. v. *White*, 2 N. J. Law J. 150 (U. S. 481, 58 L. J. Ch. 345 (1889). C. Ct.), 10 Fed. Cas. No. 5,602

48. *Alabaster v. Harness* (1895), (1879). An extraordinary case of 1 Q. B. 339, 64 L. J. Q. B. 76. champerty is presented in *Matter of*

49. *Bradlaugh v. Newgate*, 11 Q. Clark, 184 N. Y. 222, 77 N. E. 1 B. D. 1, 52 L. J. Q. B. 454 (1883); (1906).

CHAPTER VIII.

ASSAULT AND BATTERY.

§ 1. WHAT CONSTITUTES THIS TORT.

313. The right invaded by an assault, is the right to live in society without being put in reasonable fear of unjustifiable personal harm. A person who threatens another with immediate personal violence, having the apparent means and opportunity for executing the threat, commits an assault, for which a civil suit will lie,¹ though a criminal prosecution may not.² Accordingly, raising a club over the head of another and threatening to strike if the latter speaks, is an assault.³ It is sometimes said that the intent to inflict violence is essential even to a civil assault; and that when the party threatening knows that he has not the present ability to

1. *DeS. v. DeS.*, Y. B. Liber Assisarum, f. 99, pl. 60 (1348). Defendant threw a hatchet, attempting to hit plaintiff, but missed him; *Turberville v. Savage*, 1 Mod. 3, 2 Keb. 545 (1669). Plaintiff put his hand upon his sword and said: "If it were not assize time, I would not take such language from you," held no assault, as there was no threat of inflicting violence; although the court said: "If one intending to assault, strike at another and miss him, this is an assault; so if he hold up his hand against another in a threatening manner and say nothing, it is an assault;" *Mortin v. Schoppee*, 3 C. & P. 373 (1828). Riding after another, threatening to whip him is an assault, although the person pursued escapes; *Stephens v. Myers*,

4 C. & P. 349 (1830). Defendant, advancing with clenched fist, was forcibly stopped by others, before getting within striking distance of plaintiff; *Read v. Coker*, 13 C. B. 850, 22 L. J. C. P. 201 (1853). Defendant and others threatened to break plaintiff's neck, if he did not leave, and advanced upon him.

2. See *Chapman v. State*, 78 Ala. 463, 56 Am. R. 42 (1885); but see *State v. Shepard*, 10 Ia. 126 (1859).

3. *United States v. Richardson*, 5 Cranch (C. C.), 348 (1837). "His language showed an intent to strike upon her violation of a condition which he had no right to impose;" *French v. Ware*, 65 Vt. 338, 26 At. 1096 (1892). "Words never amount to an assault. They frequently characterize accompanying acts."

execute the threat, the tort of assault is not committed.⁴ The better view is, however, that the tort consists not in the wrongdoer's intention, but in his invasion of the plaintiff's right to freedom from being put in fear of bodily harm. A learned court has stated the reason for this view as follows: "One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, that each of us shall feel security against unlawful assaults. Without such security society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And it is surely not unreasonable for a person to entertain a fear of personal injury when a pistol is pointed at him in a threatening manner, when, for aught he knows it may be loaded, and may occasion his immediate death."⁵ Reasonable fear may be inspired by threatening gestures,⁶ especially when these are connected with "unlawful, sinister and wicked" conduct on defendant's part.⁷

Absence of intent, on the part of the defendant to put the plaintiff in fear of bodily harm, is pertinent to the defense that the injury was accidental, or due to a practical joke, expressly or impliedly assented to by the plaintiff.⁸ But cases of this kind are not common.^{8a}

4. *Blake v. Barnard*, 9 C. & P. 38 Am. R. 703 (1880); *Leach v. 626*, 38 E. C. L. 365 (1840). But see *Leach*, 11 Tex. Civ. App. 699, 33 S. R. v. St. George, 9 C. & P. 483 W. 702 (1895). Soliciting sexual intercourse in a manner "to excite

5. *Beach v. Hancock*, 27 N. H. 223, 59 Am. Dec. 373 (1853); *Kline v. Kline*, 158 Ind. 602, 64 N. E. 9 (1902); *Morgan v. O'Daniel* (Ky.), 53 S. W. 1040 (1899); *Moran v. Vicroy* (Ky.), 74 S. W. 244 (1903); the fear and apprehension of force in the execution of his felonious purpose was an assault;" a "willful violation of woman's most sacred right of personal security."

6. *State v. Barry*, 45 Mont. 598, 124 Pac. 775 (1912). 8. *Christopherson v. Bare*, 11 Q. B. 473, 17 L. J. Q. B. 109 (1848); *Fitzgerald v. Cavin*, 110 Mass. 153 (1872); *Nelson v. Crawford*, 129 Mich. 466, 81 N. W. 335, 80 Am. St. R. 577 (1899); *Degenhardt v. Heller*, 93 Wis. 662, 68 N. W. 411, 57 Am. S. R. 945 (1890).

7. *Handy v. Johnson*, 5 Md. 450 (1854); *Bishop v. Ranney*, 59 Vt. 316, 7 At. 820 (1887); *Keep v. Quallman*, 68 Wis. 451, 32 N. W. 527 (1887). 8a. *State v. Roby*, 83 Vt. 121, 74

7. *Newell v. Witcher*, 53 Vt. 589,

314. The right invaded by battery, is the right to be secure from all unjustifiable interference with one's person. Battery, as distinguished from assault, involves the infliction of actual violence upon the person; although the degree of violence is immaterial, and the term "person," in this connection, includes clothing and other articles which are so associated with the body as to partake of its legal inviolability. Accordingly, "the least touching of another in anger,"⁹ or as a trespasser,¹⁰ or in any manner which amounts to an "unlawful setting upon his person,"¹¹ may subject one to an action for battery. Forcibly cutting the hair of an inmate of the poorhouse, without legal authority,¹² or injuring the clothing of another while on his person,¹³ or snatching or striking an article from his hand,¹⁴ or cutting a rope which fastens an article to his body,¹⁵ or striking a horse upon which he is riding, or which is attached to a carriage in which he is seated,¹⁶ or overturning a vehicle or chair in which he is,¹⁷ is an actionable battery.

315. It is not necessary that the assailant should come into immediate contact with his victim. The force which he sets in motion may be communicated through some instrumentality,¹⁸ as a gun or a whip. If he throws a stone or other missile which hits

At. 638 (1909), the defense was not established.

9. *Cole v. Turner*, 6 Mod. 149 (1704).

10. *Richmond v. Fisk*, 160 Mass. 34, 35 N. E. 103 (1893). Defendant, without license so to do, entered plaintiff's sleeping room and touched him, so as to awaken him, in order to present a milk bill.

11. *Geraty v. Stern*, 30 Hun (N. Y.), 426 (1883). Defendant's agent forcibly took an ulster off from plaintiff.

12. *Forde v. Skinner*, 4 C. & P. 239, 19 E. C. L. 494 (1830).

13. *Reg. v. Day*, 1 Cox C. C. 207 (1845).

14. *Respublica v. DeLongchamps*, 1 Dall. 111 (1784); *Dyk v. DeYoung*, 35 Ill. App. 138 (1889).

15. *State v. Davis*, 1 Hill L. (S. C.) 46 (1832).

16. *Dodwell v. Burford*, 1 Mod. 24 (1669); *Spear v. Chapman*, 8 Ir. L. R. 461 (1846); *Clark v. Downing*, 55 Vt. 259, 45 Am. R. 612 (1882); *Marentille v. Oliver*, 2 N. J. L. (1 Pennington) 379 (1808).

17. *Hopper v. Reeve*, 7 Taunt. 698, 1 Moore, 407, 2 E. C. L. 554 (1817).

18. *Bullock v. Babcock*, 3 Wend. (N. Y.) 391 (1829); *Kendall v. Drake*, 67 N. H. 592, 30 At. 524

(1891).

the plaintiff,¹⁹ or spits in the latter's face,²⁰ a battery is committed. Fraudulent deception,²¹ or recklessness²² on the defendant's part, may be the legal equivalent of actual force.

316. Extended Signification of Assault. While the common law drew a sharp distinction, as we have seen, between assault and battery, a distinction which is still maintained in many jurisdictions,²³ the modern tendency is to give to the term "assault" an extended signification, making it denote a consummated as well as an inchoate battery.²⁴ In such signification, the term will be employed throughout the remainder of this section.

317. Excusable Assaults. For two centuries there has been unquestioned judicial authority for the proposition, that "if two were to meet in a narrow passage, and without violence or design of harm, the one touches the other gently it will be no battery."²⁵ The law accords a license for all interferences with the persons of others, which are fairly incident to ordinary conduct in the particular circumstances. It does not accord a license, however, for rude, reckless, or unnecessarily dangerous interference with the personal security of others.²⁶

Leave and license of the injured party may serve as an excuse to one who otherwise would be liable for an assault.²⁷ But to have this effect, as we have seen in a former connection, the license

19. *Peterson v. Haffner*, 59 Ind. 130, 26 Am. R. 81 (1877).

20. *Alcorn v. Mitchell*, 63 Ill. 553 (1872). Damages were assessed at \$1,000; *Whitsett v. Ransom*, 79 Mo. 258 (1883); *Draper v. Baker*, 61 Wis. 450, 21 N. W. 527, 50 Am. R. 143 (1884). Judgment for \$1,200.

21. *Cadwell v. Farrell*, 28 Ill. 438 (1862); *Carr v. State*, 135 Ind. 1, 34 N. E. 533, 20 L. R. A. 863 (1893); *Comm. v. Stratton*, 114 Mass. 303, 19 Am. R. 350 (1873); *McCue v. Klein*, 60 Tex. 168, 48 Am. R. 260 (1883); *Bartell v. State*, 106 Wis. 342, 82 N. W. 142 (1900).

22. *State v. Monroe*, 121 N. C. 677, 28 S. E. 547, 43 L. R. A. 861, 61 Am. S. R. 686 (1897). Druggist dropped croton oil on candy, in order that purchaser might play a joke on some one; *State v. Roby*, 83 Vt. 121, 74 At. 638 (1912).

23. *Shapiro v. Michelson*, 19 Tex. Civ. App. 615, 47 S. W. 746 (1898).

24. *Pollock on Torts*, (5th Ed.), 210; *New York Penal Law*, §§ 240-246.

25. *Holt, C. J.*, in *Cole v. Turner*, 6 Mod. 149 (1704).

26. *Mercer v. Corbin*, 117 Ind. 450, 20 N. E. 132, 3 L. R. A. 221, 10 Am. S. R. 76 (1889).

27. *Supra*, ¶ 83; *Fitzgerald v. Cavin*, 110 Mass. 153 (1872); *Wartman v. Swindell*, 54 N. J. L. 589, 25 At. 356, 18 L. R. A. 44 (1892).

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must have been obtained without deception, and for a lawful purpose.²⁸ Inevitable accident is an excuse for what would otherwise be an actionable assault.²⁹

318. Justifiable Assaults. These have been considered at length in a former chapter,³⁰ and it is not necessary, in this connection, to do more than enumerate the more important classes of such acts. The use of force or violence towards a person is justified on the part of a public officer or his assistants^{30a} in the performance of a legal duty;³¹ or on the part of a private person in lawfully making an arrest,³² or in the proper defense of himself, his family or his property;³³ or in the enforcement of lawful discipline at home,³⁴ in school,³⁵ on board a ship³⁶ or other public conveyance;³⁷ or in the lawful restraint or assistance of one mentally or physically incapacitated.³⁸

- 28.** *Supra*, ¶ 84; *Markley v. Whitman*, 95 Mich. 236, 54 N. W. 763, 20 L. R. A. 55, 35 Am. S. R. 558 (1893); *Lund v. Taylor*, 115 Ia. 236, 88 N. W. 333 (1901). "When the mutual combat is unlawful, mutual consent is unlawful"; *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12 (1905), surgical operation without patient's consent; *Morris v. Miller*, 83 Neb. 218, 119 N. W. 458, 20 L. R. A. N. S. 907 (1909); *State v. Roby*, 83 Vt. 121, 74 At. 638 (1912); *Willey v. Carpenter*, 64 Vt. 212, 23 At. 630, 15 L. R. A. 853 with note (1891).
- 29.** *Supra*, ¶ 61; see *Bennan v. Parsonnet*, N. J. L. , 83 At. 948 (1912), where surgeon held justified in operating though original diagnosis was mistaken.
- 30.** *Supra*, Chap. III; *Newcomb v. Russell*, 133 Ky. 29, 117 S. W. 305 (1909), "when a man's house is invaded, after reasonable request to depart, the owner may use reasonable force to eject the trespasser."
- 30a.** *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757 (1903), unjustifiable use of force by officers.
- 31.** *Supra*, ¶ 279; *State v. Feilen*, Wash. 126 Pac. 75 (1912), holding constitutional a law authorizing an operation to prevent procreation on one found guilty of rape, 26 How. L. Rev. 163.
- 32.** *Supra*, ¶ 282.
- 33.** *Supra*, ¶ 55; *Higgins v. Minaghan*, 78 Wis. 602, 47 N. W. 941, 11 L. R. A. 138, 23 Am. S. R. 428 (1891); *Morris v. Miller*, 83 Neb. 218, 119 N. W. 458, 20 L. R. A. N. S. 907 (1909).
- 34.** *Supra*, ¶ 291.
- 35.** *Supra*, ¶ 291; *Deskins v. Gose*, 85 Mo. 485, 55 Am. R. 387 (1885).
- 36.** *Supra*, ¶ 177.
- 37.** *Supra*, ¶ 177; *Montgomery v. Buffalo Ry.*, 165 N. Y. 139, 58 N. E. 770 (1900); *Lindsay v. Wabash Ry.*, 141 Mich. 204, 104 N. W. 656 (1905).
- 38.** *Supra*, ¶ 291; *Hoffman v. Eppers*, 41 Wis. 251 (1876); *Winter v. Beebe*, 126 Wis. 379, 105 N. W. 958 (1905), assault not justified to regain property.

319. Damages. Every actionable assault entitles the victim to damages, and, even though the trespass is slight, the damages are not necessarily nominal.³⁹ A different rule obtains in case of an assault upon an animal or other property. There, the owner must allege and prove that the property was actually injured.⁴⁰

In an action for trespass to the person, the plaintiff is not bound to specify in his complaint the various items of damage, unless he seeks to recover for consequential or indirect injuries.⁴¹ All legal harm that is the natural and probable result of the assault, is a proper subject for compensation;⁴² and indeed all the harm, which can be shown to have resulted directly from the assault, whether it could have been foreseen by the wrongdoer or not, should enter into the assessment of damages.⁴³

In all cases of assault, damages may be given for injuries to the plaintiff's feelings,⁴⁴ and if it is willful or reckless, or characterized by deliberate disregard of the plaintiff's rights, or by a disposition to humiliate him, punitive damages are recoverable in most jurisdictions.⁴⁵ On the other hand, plaintiff's conduct at the time of the assault, if fairly provocative of defendant's act, may be taken into account in mitigation of exemplary damages,⁴⁶ and in some

39. *Richmond v. Fisk*, 160 Mass. 34, 34 N. E. 103 (1893). In *Dunbar v. Cowger*, 68 Ark. 444, 59 S. W. 951 (1900), a verdict of \$1.00 was set aside as a travesty on justice.

40. *Slater v. Swan*, 2 Stra. 872 (1731); *Marentille v. Oliver*, 2 N. J. L. (1 Pennington) 379 (1808).

41. *O'Leary v. Rowan*, 31 Mo. 117 (1860).

42. *Brzezinski v. Tierny*, 60 Conn. 55, 22 At. 486 (1891); *Morgan v. Kendall*, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445 (1890); *Lund v. Tyler*, 115 Ia. 236, 88 N. W. 333 (1901); *Andrews v. Stone*, 10 Minn. 72 (1865).

43. *Watson v. Rinderknecht*, 82 Minn. 235, 84 N. W. 798 (1901); *Vosburg v. Putney*, 80 Wis. 523, 50 N. W. 403, 27 Am. S. R. 47, 14 L. R. A. 226 (1891); *Sedgwick on Damages* (9th Ed.), § 121b.

44. *Malsenbacker v. Concordia Society*, 71 Conn. 369, 42 At. 67, 71 Am. S. R. 213 (1899); *Southern Express Co. v. Platten*, 93 Fed. 936, 36 C. C. A. 46 (1899).

45. *Bundy v. Maginess*, 76 Cal. 532, 18 Pac. 668 (1888); *List v. Miner*, 74 Conn. 50, 49 At. 856 (1901); *Root v. Sturdivant*, 70 Ia. 55, 29 N. W. 802 (1886); *Thillman v. Neal*, 88 Md. 525, 42 At. 242 (1898); *Connors v. Walsh*, 131 N. Y. 590, 30 N. E. 59 (1892); *Pendleton v. Davis*, 46 N. C. (1 Jones L.) 98 (1853). Verdict was for \$100 actual damages and \$1,000 exemplary damages; and the court refused to disturb it; *Speas v. Sweeny*, 88 Wis. 545, 60 N. W. 1060 (1894).

46. *Willey v. Carpenter*, 64 Vt. 212, 23 At. 630, 15 L. R. A. 853 (1892); *Prindle v. Haight*, 83 Wis. 50, 52 N. W. 1134 (1892).

jurisdictions of even compensatory damages.⁴⁷ It is proper, in assessing exemplary damages, for the jury to consider the character and standing of the parties and the wealth of the defendant.⁴⁸

320. Counterclaiming Damages. It is generally held that, in case the person assaulted uses excessive force in repelling the attack and thus becomes liable to an action for assault, he cannot set off or counterclaim the damages which he sustained against those inflicted by him on the plaintiff. Such assaults are deemed distinct and independent wrongs, and not parts of a single transaction.⁴⁹

In a few jurisdictions, however, the opposite view is taken and a counterclaim is allowed.⁵⁰

321. Assault Is Distinguishable from Negligence. Injury inflicted by one upon the person of another as the result of negligence, does not constitute an assault. [Hostile or unlawful intent is an essential element in this tort,⁵¹ although such intent is often established by the recklessness of the defendant's conduct; and it is not necessary to show an actual intention to do the specific harm which was inflicted.⁵²]

322. Unconscious Victim. A person may maintain an action for a battery, although at the time the force was inflicted he was unconscious; but he cannot maintain an action for assault, unless he was conscious of the threatened attack; for his right to live, without being put in fear of personal harm, has not been invaded.⁵³

47. *Keiser v. Smith*, 71 Ala. 481, 744 (1902); New York Code of Civil Procedure, § 501.

48. *Pullman Co. v. Lawrence*, 74 Miss. 782, 22 So. 53 (1897); *Goldsmith v. Joy*, 61 Vt. 488, 17 At. 1010, 4 L. R. A. 500 (1889).

49. *Dole v. Erskine*, 35 N. H. 503 (1857); *Schnaderbeck v. Worth*, 8 Abb. Pr. (N. Y.) 37 (1858); *Dooling v. Williams*, 35 Ohio St. 58 (1878).

50. *Slone v. Slone*, 2 Metc. (Ky.) 339 (1859); *Gutzman v. Clancy*, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 4 Am. R. 55 (1869); *Palmer v. Chicago, etc., Ry.*, 112 Ind. 250, 14 N. E. 70 (1897); *Smith v. Comm.*, 100 Pa. 324 (1882).

51. *The Lord Derby*, 17 Fed. 265 (1883); *Perkins v. Stein*, 94 Ky. 433, 22 S. W. 649, 20 L. R. A. 861 (1893).

52. *Welch v. Durand*, 36 Conn. 182,

53. *State v. Barry*, 45 Mont. 598, 124 Pac. 775 (1912), criticising *People v. Lilley*, 43 Mich. 521, 5 N. W. 982 (1880).

CHAPTER IX.

. WRONGFUL DISTURBANCE OF FAMILY RELATIONS.

§ 1. THE FAMILY HEAD AND FAMILY RIGHTS.

323. By primitive law, the only member of the family, who is deemed to be harmed by an unjustifiable disturbance of family relations is the family head.¹ In his capacity as husband, the common law gave him a writ of trespass against one who ravished his wife and carried her away and detained her from him.^{1a} In his capacity as parent, he was entitled to a writ of trespass "for taking his son and heir, or his daughter and heir, and marrying her."² As master, he had "an action of trespass for taking of his apprentice or for taking of his servant."³

No such right of action in favor of the wife, or child, or servant, for the abduction or beating or unjustifiable detention of the family head, is recognized by early law. Blackstone observes that the common law, in his time, totally disregarded the loss sustained by the inferior party to the family relation. His explanation of this doctrine is: "that the inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in anything during her coverture. The child hath no property in his father or guardian, as they have in him, for the sake of giving him education and nurture. * * * And so the servant, whose master is disabled, does not thereby lose his maintenance or wages. He had no property in his master."⁴

324. **Invasions of Marital Rights.** According to Blackstone, these were actionable torts at common law, only when committed against the husband. And such seems to be the present rule in

1. For a modern definition of "Head of the Family," see Laws of Colorado, 1911, p. 45.

1a. Fitzherbert Nat. Brev. 89 O.

2. Ibid. 90 H.

3. Ibid. 91 I.

4. Blackstone's Commentaries,

Vol. 3, pp. 142; 143.

England.⁵ In the last cited case, Lord Wensleydale said: "The benefit which the husband has in the *consortium* of the wife, is of a different character from that which the wife has in the *consortium* of the husband. The relation of the husband to the wife is in most respects entirely dissimilar from that of the master to the servant, yet in one respect it has a similar character. The assistance of the wife in the conduct of the household of the husband, and in the education of his children, resembles the service of a hired domestic, tutor or governess; is of material value, capable of being estimated in money; and the loss of it may form the proper subject of an action, the amount of compensation varying with the position of the parties. This property is wanting in none. It is to the protection of such material interests that the law chiefly attends. The loss of such service of the wife, the husband, who alone has all the property of the married parties, may repair by hiring another servant; but the wife sustains only the loss of the comfort of her husband's society and affectionate attention, which the law cannot estimate or remedy. She does not lose her maintenance, which he is bound still to supply; and it cannot be presumed that the wrongful act complained of put an end to the means of that support, without an averment to that effect. And if there were such an averment, the recovery of a compensation must be by joining the husband in the suit, who himself must receive the money, which would not advance the wife's remedy. The wife is, in fact, without redress by any form of action for an injury to her pecuniary interests."

325. **Marital Torts Against the Husband.** These "are principally three: abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her."⁶

Abduction may be accomplished either by persuasion, fraud or violence,⁷ and the gist of the wrong is the invasion of the husband's right of *consortium*^{7a}—"the right to the conjugal fellowship of the

5. Holland's Jurisprudence (9th Ed.), 164, 165; Lynch v. Knight, 9 H. L. C. 577, 5 L. T. N. S. 291, 8 Jur. N. S. 724 (1861). 7. Winsmore v. Greenbank, Willes, 577 (1845); Humphrey v. Pope, 122 Cal. 253, 54 Pac. 847 (1898); Hartpence v. Rogers, 143 Mo. 623, 45 S.

6. Blackstone's Commentaries, Vol. 3, p. 139. W. 650 (1898).

7a. This term is discussed fully

wife, to her company, co-operation and aid in every conjugal relation." ⁸ According to one class of decisions, this right is invaded whenever the wife's affections are alienated with malice or improper motives, although she may continue to reside under her husband's roof. "Debauchery and elopement," according to these authorities, are not the essence of the wrong, but only "the immediate and legitimate consequences of the wrong." ⁹ According to another class of decisions, the right is not invaded unless there is adultery with the wife, or there is "enticing and procuring, or harboring and secreting her." ¹⁰

Adultery or criminal conversation with the wife is a marital tort to the husband, even though there is no alienation of her affections or abduction of her person. The gist of this wrong is the shame of the husband and the hazard of having to maintain spurious issue. Hence the recovery of a judgment against the wrongdoer for the enticement of a man's wife from him, is not a bar to an action for criminal conversation with her. ¹¹ Nor does the husband lose his right of action by his forgiveness of his wife and by living with her thereafter. ¹²

An action for damages for criminal conversation is one "for willful and malicious injury to the person and property" of the husband. ¹³

326. Marital Torts Against the Wife. While the common-law fiction obtained, that the wife's personality is merged in that of her husband, it was not strange that the courts could not see their way to providing a tort remedy for the marital wrongs of the wife.

in *Marri v. Stamford Street Ry.*, 84 Pr. 142 (1866); *Weston v. Weston*, Conn. 9, 78 At. 582 (1911); *Feneff v.* 86 App. Div. (N. Y.) 159 (1903).

N. Y. C. & H. R. Ry., 203 Mass. 278, 10. *Houghton v. Rice*, 174 Mass. 89 N. E. 436, 24 L. R. A. N. S. 1024, 366, 54 N. E. 843, 75 Am. S. R. 351 133 Am. St. R. 29 (1909); *Bolger v.* (1899); *Lellis v. Lambert*, 24 Ont. Boston Elevated Ry., 205 Mass. 420, App. 653 (1897).

91 N. E. 389 (1910); 24 Harvard 11. *Schnell v. Blohm*, 40 Hun (N. Y.), 378 (1886).

8. *Bigaonette v. Paulet*, 134 Mass. 123, 45 Am. R. 307 (1883); *Long v.* 11 S. E. 662 1890); *Stumm v. Hum-Booe*, 106 Ala. 570, 17 So. 716 (1894). mel, 39 Ia. 478 (1874).

9. *Rinehart v. Bills*, 82 Mo. 534, 18. *Tinker v. Colwell*, 193 U. S. 52 Am. R. 385 (1884); *Heermance v.* 473, 24 Sup. Ct. 505 (1904). *James*, 47 Barb. (N. Y.) 120, 32 How.

The enticement of the husband and the alienation of his affections from her, could not harm her material interests, as Lord Wensleydale pointed out in the opinion from which we have already quoted, for she could still compel him to support her. Even if the courts had thought the loss of comfort of her husband's society and affectionate attention susceptible of monetary estimation, a suit for such damages could not have been brought by her alone. The husband must have been a co-plaintiff, and the sum recovered would be his property.

327. During the latter part of the last century, the fiction of legal unity of husband and wife was greatly modified by legislation. Not only was the wife accorded the ownership and control of property possessed by her at marriage, as well as that acquired by her during coverture, but she was empowered to make contracts, to carry on business, and to maintain actions for the redress of her wrongs, as though she were unmarried.¹⁴ Her legal personality was no longer merged in that of her husband, but, for most purposes, was totally distinct and independent of his. With this change in her legal status, came naturally a change in the judicial conception of her marital wrongs. As she could maintain an action in her own name, and damages recovered would be her sole and separate property, one of the chief objections urged by Lord Wensleydale disappeared. As the law now recognized her legal equality with her husband, Blackstone's reasoning based upon the superiority of one party and the inferiority of the other party to the marital relation, had no longer the foundation of even a fiction. There remained only the view that the wife's "loss of the comfort of her husband's society and affectionate attention," is something so sentimental and ethereal, that "the law cannot estimate or remedy it."^{14a}

14. In California, Montana, North Ohio St. 327, 337, 98 N. E. 102, 104 Dakota and South Dakota, the Civil (1912), affirming 31 Ohio C. C. R. Code expressly gives to the wife the 402 (1909), and citing and following same right of action for the abduction or enticement of her husband, the above paragraph of the text, 10 Columbia Law Rev. 268; *Eliason v. Draper*, Del. , 77 At. 572 that the husband possesses for the wrongful interference with his wife. (1910), 10 Columbia Law Rev. 775, See Cal. Civ. Code, § 49; North Da- 9 Mich. Law Rev. 159; *Sims v. Sims*, kota Civ. Code, § 2718; South Da- 79 N. J. L. 577, 76 At. 1063 (1910), kota Revised Civ. Code of 1903, § reversing 77 N. J. L. 251, 72 At. 424 32. (1909).

14a. *Flandermeyer v. Cooper*, 85

328. In reply to this it has been said: "The actual injury to the wife from the loss of *consortium* is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship and affection of the other. The right of the one and the obligation of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband, and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation not only of a natural right, but also of a legal right arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects. A remedy, not provided by statute, but springing from the flexibility of the common law and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle and are caused by acts of the same nature as those of the husband, the remedy should be the same. Since her society has a value to him capable of admeasurement in damages, why is his society of no legal value to her?"¹⁵

329. **Action for Enticing Husband.** Accordingly, it is held in most American jurisdictions that the wife is entitled to an action in tort against one who entices her husband from her, alienates his affections and deprives her of his society.¹⁶

15. *Bennett v. Bennett*, 116 N. Y. 51 Am. S. R. 360, 29 L. R. A. 150 584, 590, 23 N. E. 17, 6 L. R. A. 553 (1894); *Deitzman v. Mullin*, 108 Ky. 610, 57 S. W. 247, 94 Am. S. R. 390 (1889).

16. *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847 (1898), applying § 48 of the Civil Code; *Williams v. Williams*, 20 Col. 51, 37 Pac. 614 (1894); *Foot v. Card*, 58 Conn. 1, 18 At. 1027, 23 Am. S. R. 258, 6 L. R. A. 829 (1899); *Betser v. Betser*, 186 Ill. 537, 58 N. E. 249, 78 Am. S. R. 303 (1900); *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389, 28 Am. St. R. 213, 14 L. R. A. 787 (1891); *Price v. Price*, 91 Ia. 693, 60 N. W. 202, 51 Am. S. R. 360, 29 L. R. A. 150 584, 590, 23 N. E. 17, 6 L. R. A. 553 (1894); *Deitzman v. Mullin*, 108 Ky. 610, 57 S. W. 247, 94 Am. S. R. 390 (1889); *Wolf v. Frank*, 92 Md. 138, 253, 54 Pac. 847 (1898), applying § 48 At. 132, 52 L. R. A. 102 (1900); *Nolin v. Pearson*, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. N. S. 643 (1906); *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784 (1897); *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545 (1891); *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328, 46 Am. S. R. 468, with note, 26 L. R. A. 412 (1894); *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 61 N. W.

In a few States her right to this action is denied. Such a right, it is declared, "would be the most fruitful source of litigation of any that can be thought of." It is also urged that the wife understands, when she enters the marriage relation, that her right to her husband's society is subject to various conditions, including his exposure "to the temptations, enticements and allurements of the world, which easily withdraw him from her society, or cause him to desert or abandon her," and consequently that her right to his society "is not the same in degree and value, as his right to hers." A right of action for his enticement and the alienation of his affections, say these tribunals, must be given by statute in express terms, or they will not recognize it.¹⁷ Still other courts have defeated the wife in such actions on the ground that she has not shown a loss of *consortium*.¹⁸

330. Crim. Con. with Husband. That the wife can maintain a tort action against another woman for criminal conversation with the husband has been denied, even in a jurisdiction where the abduction of the husband is held actionable.¹⁹ If the gist of this action, when brought by the husband, is, as we have heretofore stated, the shame to him, and the risk of having to support spurious issue, it would seem that the decision in the last cited case is entirely sound, in the absence of express legislation on the topic. Certainly the husband's marital infidelity subjects the wife to no risk concerning the legitimacy of her offspring; and it must be confessed that public opinion does not deem her shamed or dis-

577, 47 Am. S. R. 759, 27 L. R. A. 120 (1895); *Seaver v. Adams*, 66 N. H. 142, 19 At. 776, 49 Am. S. R. 597 (1889); *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553, with note (1889); *Brown v. Brown*, 121 N. C. 8, 27 S. E. 998, 38 L. R. A. 242, 70 Am. S. R. 574 (1897); *Westlake v. Westlake*, 34 O. St. 621, 32 Am. R. 397 (1878); *Gerner v. Gerner*, 185 Pa. 233, 39 At. 884, 40 L. R. A. 549, 64 Am. S. R. 646 (1898); *Beach v. Brown*, 20 Wash. 266, 55 Pac. 46, 72 Am. S. R. 98, 43 L. R. A. 114 (1898). 17. *Duffles v. Duffles*, 76 Wis. 374, 45 N. W. 522, 20 Am. S. R. 79 (1890); *Doe v. Roe*, 82 Me. 503, 20 At. 83, 17 Am. S. R. 499, 8 L. R. A. 833 (1890); *Lellis v. Lambert*, 24 Ont. App. 656 (1897). 18. *Neville v. Gile*, 174 Mass. 305, 54 N. E. 841 (1899); *Houghton v. Rice*, 174 Mass. 366, 54 N. E. 843, 47 L. R. A. 310 (1899). 19. *Kroessin v. Keller*, 60 Minn. 372, 62 N. W. 438, 51 Am. S. R. 533, 27 L. R. A. 685 (1895).

graced by his conduct, if that is limited to criminal conversation. Of the injury to her feelings or the outrage upon her affections, the law seems not to take cognizance.

331. Injuries to the Body or Reputation of the Wife. If these were of such a character as to deprive the husband for any time of the company and assistance of his wife, the common law gave him a separate remedy by action on the case for his damages thus sustained. For the injuries sustained by her, as an individual, the common law gave an action in the joint names of the husband and wife.²⁰ As the common law vested in the husband the recovery obtained in such a joint suit, he was in a position to discharge the cause of action without her consent,²¹ or to prevent her suing, by refusing to join as a plaintiff, or by absenting himself from the jurisdiction.²²

This has been changed to a considerable but varying extent by modern legislation; and in many jurisdictions the wife is permitted to sue alone for injuries to her person or reputation.²³ Such legislation, however, has not affected the husband's right to sue for those injuries to his wife which are also invasions of his marital rights,²⁴ or which subject him to expense because of his marital obligations to provide for the comfort and support of the wife.²⁵ The cases cited in the last two notes show that it is not necessary for the husband to prove that the injured wife sustained the relation of a servant to him. It is enough that he makes out a case of "his loss of *consortium* with her, whether this is caused by assault and battery, by medical or surgical malpractice, or by negli-

20. Blackstone's Commentaries, N. E. 1063, 60 Am. S. R. 397, 38 L. Vol. 3, p. 140. R. A. 631 (1897); Riley v. Lidtke,

21. Ballard v. Russell, 33 Me. 196, 49 Neb. 139, 68 N. W. 356 (1896); 54 Am. Dec. 620 (1851). Baltimore, etc., Ry. v. Glenn, 66 O.

22. Laughlin v. Eaton, 54 Me. 156 St. 395, 64 N. E. 433 (1902); Jones v. Utica, etc., Ry., 40 Hun (N. Y.)

23. Supra, ¶ 327; Harris v. Webster, 58 N. H. 481 (1878); Harmon Pa. 373 (1884).

v. Old Colony Ry., 165 Mass. 100, 42 N. E. 505, 52 Am. S. R. 499, 30 L. R. A. 658 (1896). 25. Smith v. City of St. Joseph, 55

24. Mewhirter v. Hatten, 42 Ia. 669, 15 S. W. 315, 22 Am. St. R. 800 288, 20 Am. R. 618 (1875); Kelley v. (1890).

N. Y., etc., Ry., 168 Mass. 308, 46

gence of any kind." This injury to the husband is deemed generally a personal injury.²⁶

§ 2. ABDUCTION.

332. Torts Against the Parent. Fitzherbert, in the passage quoted on a former page, relating to this topic, speaks only of the abduction of one's son and heir, and of the abduction and marrying of one's daughter and heir. Such invasions of the parent's right in his child rarely come before modern courts for consideration.²⁷ Most of the litigation on this subject in this country is confined to injuries to the child, which deprive the parent of the child's services,^{27a} or impose upon the parent an increased expenditure of labor or money. They may be divided into two classes: those for the seduction and debauchment of the daughter; and those for any other wrong to a child of either sex.

333. Ordinary Injuries to Parental Right in Child. These are to be distinguished from invasions of the personal rights of the child. For wrongs of that character, the child may maintain an

26. *Maxson v. Del., L. & W. Ry.*, 112 N. Y. 559, 20 N. E. 544 (1889). son had been wrongfully taken from

27. In *Hills v. Hobart*, 2 Root his custody. In *Magee v. Holland*, (Conn.), 48 (1793), the enticement 27 N. J. L. (3 Dutch.) 86, 72 Am. and marrying of a daughter was Dec. 341 (1858), it is held that while held actionable in favor of the parent, while in *Hervey v. Moseley*, 7 on the loss of service, or the labor and expense incurred in recovering the child, his recovery is not limited to compensatory damages, but may include a sum for injury to his feelings.

27a. *Kenney v. Baltimore & O. Ry.*, 101 Md. 490, 61 At. 581, 1 L. R. A. N. S. 205 (1905); *Arnold v. St. Louis & S. F. Ry.*, 100 Mo. App. 470, 74 S. W. 5 (1903), "the essence of the tort of decoying a minor from home, or harboring him after he leaves home, against his parents' will, thus depriving his parents of his services, is the unlawful enticement or harboring of the minor."

In *Rice v. Nickerson*, 9 Allen (91 Mass.), 478, 85 Am. Dec. 777 (1864), compensatory damages were al-

action;²⁸ and a recovery therein, even where the action is brought by the parent as next friend, will not affect the parent's action for injuries to him in his parental relation;²⁹ unless damages for such injuries were recovered in the former suit.³⁰

The parent's right of action for ordinary injuries to the child rests upon his right to the child's services and upon his duty of maintenance. Even though the child is too young to render valuable service, the parent is entitled to recover for any extra expense, to which he is put by the defendant's tortious act, in maintaining the child; and in most of our jurisdictions he is entitled to recover for such services of the child as he may lose in the future in consequence of the injury.³¹ While our courts are coming to treat this action of the parent as based upon the parental relation, rather than on the relation of master and servant, they exclude the elements of affection and sentiment, as well as of parental interest in the future welfare of the child. Accordingly, they do not permit a recovery in tort by a parent against school officers, who wrongfully expel a child from school;³² or for wounded feelings and anxiety because of the pain, or distress, or insult, or disfigure-

28. *Wilton v. Middlesex Ry. Co.*, *landsch v. Hollander*, 59 Fed. 417, 107 Mass. 108, 9 Am. R. 11 (1871). 20 U. S. App. 225, 8 C. C. A. 169

29. *Wilton v. Middlesex Ry. Co.*, (1894): "The evidence showed the child's disability had lasted for 125 Mass. 130 (1878).

30. *Baker v. Flint & P. M. Ry.*, 91 Mich. 471, 51 N. W. 897, 30 Am. S. R. 298, 16 L. R. A. 154 (1892): "It is undoubtedly true that as a question of law, Oscar had no right in his suit to recover such damages without the consent of his father; but he did recover with the consent of his father; therefore the father is now estopped from setting up a claim for the same damages in this action in his own name."

31. *Durden v. Barnett*, 7 Ala. 169 (1844); *Sykes v. Lawlor*, 49 Cal. 236 (1874); *Cumming v. Brooklyn, etc., Ry.*, 109 N. Y. 95, 16 N. E. 65 (1888); *Barnes v. Keene*, 132 N. Y. 13, 29 N. E. 1090 (1892); *Neder-*

more than a year, and still continued, thus raising the presumption that it would continue in the future for a longer or shorter period. Having these facts and the age and sex of the child before them, the jury were as well qualified as an expert could be to form a correct opinion as to the duration of her incapacity, and the value of her services to her father."

32. *Donahoe v. Richards*, 38 Me. 376, 61 Am. Dec. 256 (1854); *Spear v. Cummings*, 23 Pick. (40 Mass.) 224, 34 Am. Dec. 53 (1839); *Stephenson v. Hall*, 14 Barb. (N. Y.) 222 (1852).

ment of the child;³³ or for loss of the child's society;³⁴ or for a libel to a deceased child.³⁵

334. Injury to Parent by Seduction of Daughter. "The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter, has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest. * * * It has, therefore, always been held that the loss of service must be alleged in the declaration, and that loss of service must be proved at the trial, or the plaintiff must fail. It is the invasion of the legal right of the master to the services of his servant, that gives him the right of action for beating his servant; and it is the invasion of the same legal right, and no other, which gives the father the right of action against the seducer of his daughter."

Such is the language of a learned chief justice,³⁶ and it still embodies the legal rule upon this topic in England. It is true that the father makes out a *prima facie* case of service, by proof that the seduced daughter was a minor and unmarried; and that the courts are astute to discover the relation of master and servant, even where the daughter's service possesses no pecuniary value for the parent.³⁷ But the "working of the action for seduction in modern practice" is admittedly "capricious" in England.³⁸ It "affords protection to the rich man whose daughter occasionally

³³. *Dennis v. Clark*, 2 Cush. (Mass.) R. I. 447, 53 At. 320, 60 L. R. A. 122 347, 48 Am. Dec. 671 (1848); Cow-

den v. Wright, 24 Wend. (N. Y.) 429, 35 Am. Dec. 633 (1840); *Whitney v. Hitchcock*, 4 Den. (N. Y.) 461, (1847). But see *Magee v. Holland*, 27 N. J. L.

86, 72 Am. Dec. 341 (1858), where exemplary damages were held proper, in the case of abduction of children, "for the injury done to his feelings and to prevent similar abuses."

³⁴. *Louisville, Etc. Ry. v. Rush*, 127 Ind. 545, 26 N. E. 1010 (1890);

McGarr v. National, Etc. Mills, 24

R. I. 447, 53 At. 320, 60 L. R. A. 122 347, 48 Am. Dec. 671 (1848); Cow-

³⁵. *Bradt v. New Nonpareil Co.*, 108 Ia. 449, 79 N. W. 122, 45 L. R. A. 681 (1899); *Sorensen v. Balaba*, 11 App. Div. (N. Y.) 164 (1896).

³⁶. *Tindal, C. J.*, in *Grinnell v. Wells*, 7 Man. & G. 1033, 14 L. J. C. P. 19 (1844).

³⁷. *Carr v. Clark*, 2 Chit. 260, 23 R. R. 748 (1818); *Terry v. Hutchinson*, L. R. 3 Q. B. 599, 37 L. J. Q. B. 251 (1868); *O'Reilly v. Glavey*, 32 Ir. L. R. 316 (1892).

³⁸. *Pollock on Torts* (6th Ed.), 229.

makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn her bread amongst strangers.”³⁹

335. The Same Subject. American Law. The theory of an injury to the parent, in his character of master, is accepted in most of our States as the basis of his right of action. But, it has been judicially declared, this theory “is little more than a legal fiction used as a peg to hang a substantial award of damages on, as compensation not to the master but to the head of the family. It is accordingly established, in this country at least, that the father may maintain his action for the seduction of his minor daughter, although she is not a member of his household, but is in actual employ of another, enjoying the fruits of her labor with her father’s consent; if he has not relinquished, past the power of recall, his right to control her services.”⁴⁰ It is sometimes said that the law conclusively presumes the relation of master and servant to exist between the father and a minor daughter; that it is not necessary to show actual service; that constructive service is sufficient.⁴¹ If the daughter was of age when seduced, the father must show that “by mutual assent the relation of master and servant did exist” between him and his daughter.⁴² It is not necessary, however, to establish a binding contract relation between them.⁴³

In some of our States, the fiction of service as the basis of this

³⁹. Sergeant Manning, in note to Grinnell v. Wells, 7 M. & G. 1044.

⁴⁰. Simpson v. Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. S. R. 52 (1891).

⁴¹. White v. Murtland, 71 Ill. 250, 22 Am. R. 100 (1874); Kennedy v. Shea, 110 Mass. 147, 14 Am. R. 584 (1872); Middleton v. Nichols, 62 N. J. L. 636, 43 At. 575 (1899); Martin v. Payne, 9 Johns. 387, 6 Am. Dec. 288 (1812); Lipe v. Eisenlerd, 32 N. Y. 229 (1865); Hudkins v. Hudkins, 22 W. Va. 645 (1883); Lavery v. Crooke, 52 Wis. 612, 38 Am. R. 768 (1881).

⁴². Beaudette v. Gagne, 87 Me. 534, 33 At. 23 (1895); Mercer v. Walmsley, 5 H. & J. (Md.) 27, 9 Am. Dec. 486 (1820); Vossell v. Cole, 10 Mo. 634, 47 Am. Dec. 136 (1847); Davidson v. Abbott, 52 Vt. 570, 36 Am. R. 767 (1880); Lee v. Hodges, 13 Gratt. (Va.) 726 (1857).

⁴³. Cases in last note, and Lamb v. Taylor, 67 Md. 85, 8 At. 760 (1887); Sutton v. Huffman, 32 N. J. L. 58 (1866); Lipe v. Eisenlerd, 32 N. Y. 229 (1865); Briggs v. Evans, 5 Ired. L. (27 N. C.) 16 (1844); Hahn v. Cooper, 84 Wis. 629, 59 N. W. 1022 (1893).

action has been abolished by statutes in express terms;⁴⁴ and in others, the statutory provision that "all fictions in pleading are abolished," has been held to so far modify the common-law rule on this subject, as to permit a "parent to maintain an action for the seduction of the daughter, without averment or proof of loss of services, or expenses of sickness."⁴⁵

It is held, generally, in this country, that the mother, when the actual head of the family by reason of the husband's death or desertion,⁴⁶ or any other person, who in fact is *in loco parentis*⁴⁷ to the seduced girl, may maintain the action.

336. Damages in Actions for Seduction. These are not limited, even under the common-law rule, to compensation for loss of services, or for actual expenditures due to the seduction. While the action is in form for loss of service, it is in fact for a personal injury to the parent,⁴⁸ and juries are always instructed that they can take into consideration injury to the plaintiff's feelings.⁴⁹ "The loss of service is not the rule of damage. It has been said that it is scarcely an item in the account. The real ground of damage is the disgrace of the family. The loss of service in many, in most instances could hardly be accounted anything, and yet often where the least service is or can be performed the highest damages can be given. The loss of service is but one step to that high plane of injury and wrong for which the parent is entitled to compensation. Damages are given to the plaintiff standing in the relation of parent."⁵⁰

44. Cal. Civ. Code, § 49; Code of Civ. Proc., § 375; Montana Civ. Code, § 35; North Dak. Civ. Code, § 2718; South Dak. Rev. Civ. Code of 1903, § 32; Hill's (Oregon) Code, § 35, applied in Patterson v. Hayden, 17 Ore. 238, 21 Pac. 129, 3 L. R. A. 529, 11 Am. St. R. 822 (1889). See other jurisdictions cited in 25 Am. & Eng. Enc. of Law, p. 209.

45. Van Size, 56 N. Y. 435, 15 Am. R. 441 (1874); Davidson v. Abbott, 53 Vt. 570, 36 Am. R. 767 (1880).

46. Certwell v. Hoyt, 6 Hun (N. Y.), 575 (1876); Moritz v. Garnhart, 7 Watts (Pa.), 302, 32 Am. Dec. 762 (1838); Maguinay v. Saudek, 5 Sneed (37 Tenn.), 146 (1857).

47. Hutcherson v. Durden, 113 Ga. 987, 39 S. E. 495, 54 L. R. A. 811 (1901).

48. Anthony v. Norton, 60 Kan. 341, 56 Pac. 520, 72 Am. St. R. 360, 44 L. R. A. 757 (1899); Hood v. Sudderth, 111 N. C. 215, 16 S. E. 397 (1892).

49. Howard v. Crowther, 8 M. & W. 601, 5 Jurist, 914 (1841).

50. Middleton v. Nichols, 62 N. J. L. 636, 43 At. 575 (1899).

46. Hammond v. Corbett, 50 N. H. 501, 9 Am. R. 288 (1871); Furman v.

337. Where the common-law rule obtains and damages for loss of service are sought, the plaintiff must show that these are the proximate effect of the seduction. Incapacity to labor caused by pregnancy, or sexual disease, or actual bodily injury resulting directly from the defendant's misconduct, causes a loss of service which is to be recompensed. "But if the loss of health is caused by mental suffering, which is not the consequence of seduction, but is produced by subsequent intervening causes, such as abandonment by the seducer, shame resulting from exposure, or other similar causes, the loss of services is too remote a consequence."⁵¹

At common law, the assent of the child to the seduction does not bar the parent's action. "In respect to him," it has been declared, "she had no right to consent, and her act in assenting, or even procuring, the criminal connection was a nullity. So the defendant must stand as a wrongdoer, from whose act the plaintiff has suffered damage."⁵² In a few jurisdictions, it has been held that her voluntary assent limits the parent's recovery to his actual loss.⁵³ The Supreme Court of Oregon has ruled that the statute of that State, which authorizes a parent to maintain an action for the seduction of a daughter, though the latter be not living at home and there be no loss of service, has entirely changed the character of the action; and that the parent's action will be defeated, if the defendant shows that the daughter voluntarily submitted to illegal intercourse, and was not overcome by the defendant's artifice, promise or persuasion.⁵⁴

§ 3. TORTS AGAINST THE MASTER.

338. **Harming or Enticing the Servant.** Fitzherbert's statement that "a man shall have an action of trespass for taking of his apprentice, or for taking of his servant,"⁵⁵ is preceded and fol-

51. *Abrahams v. Kidney*, 104 Mass. 468, 81 N. W. 522 (1900); *Lawrence v. Spence*, 99 N. Y. 669, 2 N. E. 145 222, 6 Am. R. 220 (1870).

52. *McAulay v. Birkhead*, 13 Ired. (1885).
(35 N. C.) 28, 55 Am. Dec. 427 53. *Hill v. Wilson*, 8 Blackf. (Ind.) (1852); *Simpson v. Grayson*, 54 Ark. 123 (1846); *Comer v. Taylor*, 82 Mo. 404, 16 S. W. 4, 26 Am. S. R. 52 341 (1884).

(1891); *Leucker v. Steilen*, 89 Ill. 54. *Patterson v. Hayden*, 17 Ore. 545, 31 Am. R. 104 (1878); *Stoudt v. 238, 21 Pac. 129, 3 L. R. A. 529, 11 Shepherd*, 73 Mich. 588, 41 N. W. 696 Am. St. R. 822 (1889).
(1889); *Hein v. Holridge*, 78 Minn. 55. *Natura Brevium*, 91, l.

lowed by an enumeration of various injuries to property for which trespass would lie. His view, that a wrongful interruption of the relation of master and servant is an interference with the property right of the master, has never been questioned by the courts.⁵⁶ One who takes or entices a servant from his master, without justifiable cause, or who wrongfully injures him so that he is disabled from rendering service, commits an actionable wrong against the master; the wrong consisting not in the act itself, but in the consequent loss to the master.⁵⁷

Fitzherbert also notes⁵⁸ a "writ of trespass against those who lie near the plaintiff's house, and will not suffer his servants to go into the house, nor the servants who are in the house to come out thereof," so that plaintiff loses "the profits of his land" and "his service of the same men and servants." Commenting on this writ, a learned writer has said: "It seems, therefore, that 'picketing,' so soon as it exceeds the bounds of persuasion and becomes physical intimidation, is a trespass at common law against the employer."⁵⁹ Such is the view generally entertained in this country.⁶⁰ If the damage threatened by this intimidation is such as cannot be adequately remedied in a common-law action, equity will enjoin the intimidators, although their acts may be in violation of criminal law.⁶¹

Whether the moral, as distinguishable from the physical intimidation of servants is an actionable wrong to the master, is a subject

56. Grinnell v. Wells, 7 M. & G. Garret v. Taylor, Croke Jac. 567 1033, 1041, 14 L. J. C. P. 19 (1844). (1621), where the servants were

57. Robert Mary's Case, 9 Coke, threatened with mayhem.

111b, 113a (1613); Jones v. Blocker, 59. Pollock on Torts (6th Ed.), 230, 43 Ga. 331 (1871). "The master has note k.

purchased for a valuable consideration 60. Supra, ¶ 74. Kernan v. Humble, the services of his domestics;" Ames 51 La. Ann. 389, 25 So. 421 (1899); v. Union Ry. Co., 117 Mass. 541, 19 Beck v. Ry., Etc. Union, 118 Mich. Am. R. 426 (1875); Apprentice injured by defendant's negligence; 497, 77 N. W. 13, 74 Am. S. R. 421, 42 L. R. A. 407 (1893).

Bixby v. Dunlap, 56 N. H. 456, 22 Am. 61. Consolidated Steel Co. v. Murray, 80 Fed. 811 (1897); Shoe Co. v. N. C. 601, 16 Am. R. 780 (1874); Saxey, 131 Mo. 212, 32 S. W. 1106, 52 Huff v. Watkins, 15 S. C. 82, 40 Am. Am. St. R. 622 (1895); O'Neil v. Behanna, 182 Pa. 236, 37 At. 843, 61 R. 680 (1880).

58. *Natura Brevium*, 87 N. See Am. St. R. 702, 38 L. R. A. 382 (1897).

upon which the authorities are divided, as we have seen in a former section.⁶²

339. Torts Against the Servant by Wrongfully Influencing the Master. Undoubtedly the servant has no cause of action in tort against one who beats or kills the master, although the assault or death may result in pecuniary harm to the servant. In the language of Blackstone, he hath "no property in the master."⁶³ And yet, the common law justifies the servant in defending his master against an assault,⁶⁴ thus recognizing his interest in the master.

Recently, the question has often arisen, whether the servant has an action in tort against those who wrongfully influence the master to discharge him, or to refuse to give him employment, which but for such wrongful influence he would have obtained. When the conduct of such persons in influencing the master is a violation of the criminal law,⁶⁵ or when it takes the form of a conspiracy to accomplish a result which no one of the wrongdoers could effect alone,⁶⁶ and results in actual harm to the servant, he can maintain a tort action for damages in most jurisdictions. If, however, the conduct of the defendants is not positively illegal, and does not exceed the limits of fair competition, it does not amount to a tort, even against the servant who is actually harmed thereby, and whom the defendants actually intended to harm.⁶⁷ Whether the moral

^{62.} Supra, ¶ 74. *Vegetahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 57 Am. S. R. 543, 35 L. R. A. 722 (1896); *Allen v. Flood* (1898), A. C. 1, 67 L. J. Q. B. 119.

^{63.} Commentaries, 143.

^{64.} ——— v. *Fakenham*, Y. B. 9 Ed. IV. f. 48, pl. 4 (1470); *Leward v. Basely*, 1 Ld. Raym. 62 (1695).

^{65.} *Old Dominion Steamboat Co. v. McKenna*, 18 Abb. N. C. 262, 24 Blatch. 244, 30 Fed. 48 (1887); *Casey v. Cincinnati Typo. Union*, 45 Fed. 135, 12 L. R. A. 193, with note (1891); *Quinn v. Leathem* (1901), A. C. 495, 70 L. J. Q. B. 76; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 57 Am. S. R. 496, 37 L. R. A. 802 (1897); *Garret v. Taylor*, Croke Jac. 567 (1621). See note in 24 Abb. N. C. 260.

^{66.} *Quinn v. Leathem* (1901), A. C. 495, 70 L. J. Q. B. 76; *Giblan v. Nat. Amalgamated Union* (1903), 2 K. B. 600, 72 L. J. K. B. 907; *Lucke v. Clothing Cutter's Co.*, 77 Md. 396, 26 At. 505, 39 Am. S. R. 421, 19 L. R. A. 408 (1893).

^{67.} *Allen v. Flood* (1898), A. C. 1, 67 L. J. Q. B. 119; *Continental Ins. Co. v. Board of Fire Underwriters*, 67 Fed. 310 (1895); *National Protec. Assoc. v. Cummings*, 170 N. Y. 315, 63 N. E. 369, 88 Am. S. R. 648, 58 L. R. A. 135 (1902); *Raycroft v. Tayntor*, 68 Vt. 219, 35 At. 53, 54 Am. S. R. 882, 33 L. R. A. 225 (1896).

intimidation of masters or employers exceeds the limits of fair competition is a point upon which not only different courts, but different members of the same court, have disagreed.⁶⁸

§ 4. CONSPIRACY AS A TORT.

340. Conspiracy Without Injury. The cases, which were cited in the notes to the last section, contain much discussion of the controverted question, whether conspiracy is a separate tort. Some of the judicial opinions answer this question in the negative. Conspiracy, according to the authors of these opinions, is never the *gravamen* of the action. They declare that unless the acts, which the conspirators combined to do, would be tortious if done by one of them, they do not become tortious by reason of the conspiracy; that damage to the plaintiff is the gist of the action.⁶⁹

It is undoubtedly true that a mere conspiracy to injure another is not actionable as a tort. Injury must ensue, or a tort action will

⁶⁸. See cases in last two notes, and 318, 28 At. 669 (1893); *Porter v. Chipley v. Atkinson*, 23 Fla. 206, 1 So. Mack, 50 W. Va. 581, 40 S. E. 459 934, 11 Am. S. R. 367 (1887); *London (1901)*. In the last cited case it is *Guar. Co. v. Horn*, 101 Ill. App. 355 said: "Owing to its rare character, (1902), *aff'd* 206 Ill. 493, 69 N. E. the law regarding this kind of ac- 526 (1904); *Perkins v. Pendleton*, 90 tion has not been well defined, and Me. 166, 38 At. 96, 60 Am. S. R. 252 the decisions of the courts have (1897). In the last cited case it is produced some confusion in regard declared that inducing the master to thereto. The principal authorities discharge or not to employ a servant, maintain that the common law ac- by persuasion or argument, however tion of conspiracy is obsolete, and whimsical or absurd, or by threat to that there has been substituted do what the defendant has a right to therefor an action on the case in do, is not a tort towards the servant, the nature of a conspiracy. That though the defendant's motives are the allegation of conspiracy is mere malicious; but to intimidate the mas- matter of aggravation, and need not ter into discharging the servant, or be proven, except to fix the liabil- withholding employment, by fraud or ity of several defendants; and does by unlawful threats, is an actionable not change the nature of the action wrong.

⁶⁹. *Parker v. Huntington*, 2 Gray subject to all the settled rules of such (68 Mass.), 124, 66 Am. Dec. 455 action." *Green v. Davis*, 182 N. Y. (1854); *Hutchins v. Hutchins*, 7 Hill 499, 75 N. E. 536 (1905), reversing (N. Y.), 107 (1845); *Van Horn v. 100 App. Div. 359, 91 N. Y. Supp. Van Horn*, 52 N. J. L. 285, 20 At. 485, 470 (1905), 5 *Columbia Law Rev.* 10 L. R. A. 184 (1890); 56 N. J. L. 233.

not lie. But when one sustains actual harm as the result of concerted action on the part of others, and the harm is such as could not have been inflicted by any of the parties acting singly, it would seem that the distinctive element of the tort is the conspiracy rather than the damage. Damage is an essential element in malicious prosecution, in deceit and in many cases of slander; but no one contends that such fact warrants the assertion that there is no such tort, as malicious prosecution, or deceit, or defamation by slanderous words which are not actionable *per se*.

341. Concert or Combination. "The essence of conspiracy," to quote from a distinguished jurist, "so far as it justifies a civil action for damages, is a concert or combination to defraud or to cause other injury to person or property, which actually results in damage to the person or property of the person injured or defrauded."⁷⁰

That such a concert or combination "differs widely from an invasion of civil rights by a single individual cannot be doubted."⁷¹

⁷⁰, Dwight, C., in *Place v. Minster*, 65 N. Y. 89, 95 (1875). In *Bishop on Non-Contract Law*, § 362, it is said: "The term 'conspiracy' is in our books oftener misapplied than used correctly. In the just meaning of the word, the title is a considerable one in the criminal law; in our civil jurisprudence it is narrow, yet it exists and is important. It signifies in the true and narrow sense, a wrongful combination of persons to do an act or acts, which when done have brought to another an injury of a sort not admitting of being accomplished alone." Examples of such a tort are afforded by *Griffith v. Ogle*, 1 Binney (Pa.), 172 (1806), holding distinctly that damage is not the gist of the action; and *Wildee v. McKee*, 111 Pa. 335, 2 At. 108, 56 Am. R. 271 (1885).

See two articles in 7 *Columbia Law Rev.* 229, and 8 *Id.* 117, on "Conspiracy as a Crime and a

Tort;" also "Conspiracy in Civil Actions," 36 *Law Mag. & Rev.* 151; *Bigelow on Torts* (8th Ed.), 24.

⁷¹. Lord Macnaghten, in *Quinn v. Leathem* (1901), A. C. 495, 511, Cf. Lord Lindley's statement on p. 539: "But numbers may annoy and coerce where one may not." In *Arthur v. Oakes*, 63 Fed. 310, at p. 321, Harlan, J., says: "It is one thing for a single individual, or for several individuals, each acting upon his own responsibility and not in co-operation with others, to form the purpose of inflicting actual injury upon the property or rights of others. It is quite a different thing in the eye of the law, for many persons to combine or conspire together with the intent, not simply of asserting their rights or of accomplishing lawful ends by peaceable methods, but of employing their united energies to injure others or the public."

"It may be punished criminally by indictment, or civilly by an action on the case in the nature of a conspiracy, if damage has been occasioned to the person against whom it is directed. It may consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements, whether of a criminal or of an actionable conspiracy are the same, though to sustain an action special damage must be proved."⁷²

"The number and compact give weight and cause danger."⁷³

342. The true rule applicable to conspiracies against servants has been well stated as follows: "Every man has a right to employ his talents, industry and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. * * * While such a conspiracy may give to the individual, directly affected by it, a private right of action for damages, it at the same time lays a basis for an indictment, on the ground that the State itself is directly concerned in the promotion of all legitimate industries and the development of all its resources, and owes the duty of protection of its citizens engaged in the exercise of their callings."⁷⁴

72. Lord Brampton, in *Quinn v. Leathem* (1901), A. C. 495, at p. 528. To the same effect, *Carew v. Ruthford*, 106 Mass. 1, 10, 8 Am. R. 287 (1870); *Giblan v. National Amalgamated Union* (1903), 2 K. B. 600, 621-624. Both of these cases approve of the decision in *Gregory v. Duke of Brunswick*, 6 M. & G. 205, 6 Scott. N. R. 809, 1 C. & K. 24 (1843), that a conspiracy to hiss another off the stage, and so injure him in his trade or calling, was illegal and actionable.

It has been said that there was no actual decision to the above effect, but Lord Chancellor Halsbury has pointed out that the report of the case, in 6 Scott, N. R. 809, 822, shows that such decision was made. See (1901) A. C., p. 503. Lord Macnaghten referred to the

case, as an authority for the proposition that "a conspiracy to injure, resulting in damage, gives rise to a civil liability." It is also treated as an authority for that proposition by Lord Bowen in *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 614 (1889), cited approvingly in *Allen v. Flood* (1898), A. C., 1, at p. 74.

73. *Mulcahy v. Reg.*, L. R. 3 H. L. 306, 317 (1868).

74. *State v. Stewart*, 59 Vt. 273, 9 At. 559, 59 Am. R. 710 (1887). See *Knight & Jillson Co. v. Castle*, 172 Ind. 97, 87 N. E. 976, 27 L. R. A. N. S. 573 (1909); *Purington v. Hinchliff*, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. N. S. 824 (1905); *Franklin Union No. 40 v. Peo.*, 220 Ill. 355, 77 N. E. 176, 4 L. R. A. N. S. 1001, 110 Am. St. R. 248 (1906).

CHAPTER X.

DEFAMATION.

§ 1. NATURE OF THE TORT.

343. The Right Invaded by Defamation. This tort is an invasion of a person's right to enjoy a good reputation, until by his misconduct he has forfeited it. "The law recognizes the value of such a reputation and constantly strives to give redress for its injury."¹ Moreover the law presumes that every person is entitled to enjoy a good reputation, until it is shown that he is not so entitled.² Consequently, the plaintiff is not bound to show the falsity of a defamatory statement. On the contrary, the burden of proving its truth is on the defendant.³

It is to be borne in mind, too, that the issue tendered in an action for defamation is not the character of the plaintiff, but the wrongfulness of the particular statement. Accordingly, "It is not

1. *Times Pub. Co. v. Carlisle*, 94 Fed. 762, 36 C. C. A. 475 (1889); In this case Sanborn, J., said: "'A good name is rather to be chosen than great riches, and loving favor rather than silver and gold.' The respect and esteem of his fellows are among the highest rewards of a well spent life vouchsafed to man in this existence. The hope of them is the inspiration of his youth, and the possession of them the solace of his later years. A man of affairs, a business man, who has been seen and known of his fellowmen in the active pursuits of life for many years, and who has developed a good character and an unblemished reputation, has secured a possession more useful and more valuable than lands, or houses, or silver or gold. Taxation may confiscate his lands; fire may burn his houses; thieves may steal his money; but his good name, his fair reputation, ought to go with him to the end — a ready shield against the attacks of his enemies, and a powerful aid in the competition and strife of daily life;" *Dixon v. Holden*, L. R. 7 Ed. 488, 492 (1869); *De Crespigny v. Wellesby*, 5 Bing. 392, 406 (1829).
2. *Ibid.* *Conroe v. Conroe*, 47 Pa. 198, 201 (1864); *Atwater v. Morning News Co.*, 67 Conn. 504, 34 At. 865 (1896); *Pier v. Speer*, 73 N. J. L. 633, 637, 64 At. 161 (1905).
3. *Belt v. Laws*, 51 L. J. Q. B. 359, 361 (1882); *Ellis v. Buzzell*, 60 Me. 209, 211, 11 Am. R. 204 (1872); *Lewis v. News Co.*, 81 Md. 466, 473, 32 At. 246, 29 L. R. A. 59 (1895); *Sotham v. Drivers' Telegram Co.*, 239 Mo. 606, 144 S. W. 428 (1912).

a defense to a libel or slander that the plaintiff has been guilty of offenses other than those imputed to him, or of offenses of a similar character; and such facts are not competent in mitigation of damages. The only tendency of such proof is to show not that the plaintiff's reputation is bad, but that it ought to be bad."⁴ The distinction between character and reputation ought to be sharply made and strictly observed, in the discussion of this topic. Reputation is the estimate in which others hold a person,⁵ "the common knowledge of the community,"⁶ in which he lives, based upon "the slow spreading influence of opinion, arising out of his deportment in the society in which he moves."⁷ "An existing reputation," it has been declared, "is a fact to which any one may testify who knows it. He knows it because he hears it, and what he hears constitutes the reputation."⁸ Character, on the other hand, is not built upon hearsay; is not determined by the opinion of others and is not susceptible to harm from scandal. It has been judicially defined as "that which is habitually impressed by nature, traits or habits upon a person."⁹

343a. When it is said that "evidence of the plaintiff's general bad character at the time of the alleged libel is admissible for the purpose of mitigating damages, but that testimony of particular facts affecting plaintiff's character cannot be received for such purpose,"^{9a} what is meant is, that the "evidence must be confined to the general reputation of the plaintiff, and cannot be directed to showing other and disconnected immoralities."^{9b}

4. *Sun Printing Co. v. Schenck*, 98 Fed. 925, 40 C. C. A. 163 (1900); when the plaintiff is charged with being a thief, it is competent for defendant to show that he has the general reputation of being a thief; *Drown v. Allen*, 91 Pa. 393 (1879); See *Conroe v. Conroe*, 47 Pa. 198 (1864); *O'Connor v. Press Pub. Co.*, 24 Misc. 564, 70 N. Y. Supp. 367 (1901); *Tribune Association v. Folwell*, 107 Fed. 646 (1901).

5. *Spaits v. Poundstone*, 87 Ind. 522, 44 Am. R. 773 (1882); *Cooper v. Greeley*, 1 Den. (N. Y.) 347, 365 (1845).

6. *Chellis v. Chapman*, 125 N. Y. 214, 221, 26 N. E. 308, 11 L. R. A. 784 (1891); *Smith v. Compton*, 67 N. J. L. 548, 557, 52 At. 386, 58 L. R. A. 480 (1902).

7. *Wright v. City of Crawfordsville*, 142 Ind. 636, 642, 42 N. E. 227 (1895).

8. *Bathrick v. Detroit Post*, 50 Mich. 629, 642, 45 Am. R. 63 (1883).

9. *Wright v. Crawfordsville*, 142 Ind. 636, 642, 42 N. E. (1895).

9a. *Fodor v. Fuchs*, 79 N. J. L. 529, 76 At. 1081 (1910).

9b. *Sayre v. Sayre*, 25 N. J. L. 235 (1855); *Bergstrom v. Ridgway Co.*,

344. Injury to Reputation by Means Other than Defamation. The reputation of a person may be harmed by the conduct of another, without a cause of action for libel or slander accruing to him. It may be that the one thus injured has no redress, as where a master refuses to give a servant a "character;" for the common law does not recognize a servant's right to a "character" from his master.¹⁰ Even when the conduct is tortious and injurious to reputation, it may not amount to defamation, as where a banker, having sufficient funds of his customer, wrongfully dishonors the latter's checks,¹¹ or where the payee negligently has plaintiff's note protested for non-payment, although it had been paid;¹² or when a creditor institutes legal proceedings against his debtor in a way, and with the view of giving the impression that the debtor is insolvent;¹³ or when detectives resort to "rough shadowing" of a person without legal authority.^{13a}

138 App. Div. 178, 123 N. Y. Supp. 29 (1910); *Dowie v. Priddle*, 216 Ill. 553, 75 N. E. 246 (1905); *Contra*, *Osterheld v. Star Co.*, 146 App. Div. 388, 131 N. Y. Supp. 247 (1911). See comments on, 12 Col. Law Rev. 171; *Earley v. Winn*, 129 Wis. 291, 109 N. W. 633 (1906). Statute of 1911, p. 156. Similar statutes have been held unconstitutional in *Wallace v. Railway*, 94 Ga. 732, 22 S. E. 579 (1899), and *Atchison, Etc. Ry. v. Brown*, 80 Kan. 312, 102 Pac. 459 (1909), cited approvingly in *Adair v. U. S.*, 208 U. S. 161, 175, 28 Sup. Ct. 277 (1908).

10. *Cleveland, Etc. Ry. v. Jenkins*, 174 Ill. 398, 51 N. E. 811, 66 Am. St. R. 296 (1898); *New York, Chic., Etc. Ry. v. Schaffer*, 65 Oh. St. 414, 62 N. E. 1036, 87 Am. S. R. 628 (1901). The English Merchant Shipping Act, 1854, § 172, requires a certificate to be given to a discharged seaman; but a violation of the statute subjects the master to a penalty, not to an action for defamation. *Vallance v. Falle*, 13 Q. B. D. 109 (1884). See U. S. Rev. Statutes, § 4551; also *St. Louis S. W. Ry. v. Hixon*, — Tex. Civ. App. —, 126 S. W. 328 (1910), applying "Blacklisting" statute, Tex. Rev. (1913).

11. *J. M. James Co. v. Cont. Nat. Bank*, 105 Tenn. 1, 58 S. W. 261, 80 Am. St. R. 856, 51 L. R. A. 255 (1900).

12. *State Mut. Life v. Baldwin*, 116 Ga. 855, 43 S. E. 262 (1903). In *May v. Jones*, 88 Ga. 308, 14 S. E. 552, 30 Am. S. 154, 15 L. R. A. 637 (1891), it was held libelous to "falsely and maliciously protest" commercial paper.

13. *Brewer v. Dew*, 11 M. & W. 625, 12 L. J. Exch. 448 (1843); *Odgers Libel & Slander* (3d Ed.), p. 13.

13a. *Schultz v. Frankfort, Etc. Ins. Co.*, — Wis. —, 139 N. W. 386 (1913).

In some jurisdictions, an action is given by statute for insulting words, although they are not defamatory and although they may not be heard or read by a third person.¹⁴

345. Publication. As the gist of the tort now under discussion consists in the injury done to reputation, it follows that the defamatory statement must have been published in order to be actionable.¹⁵ No such injury is done when the statement is communicated to the person, concerning whom it is made, without its coming to the knowledge of a third person.¹⁶ Accordingly, a plaintiff does not make out a cause of action for slander by proving that the defendant spoke defamatory words to him. He must go further and show that "they were so spoken as to have been heard by a third person;"¹⁷ and, if spoken in a foreign language, that they were understood by some one who heard them.¹⁸ Nor is a cause of action established by proof, that a defamatory letter or print was sent by defendant to the plaintiff.¹⁹ Evidence must be given that it was read to or by a third person, and that defendant was responsible for such publication.²⁰ It is to be noted, however, that plain-

14. Rolland v. Batchelder, 84 Va. 664; 5 S. E. 695 (1888); Sun Life Assur. Co. v. Bailey, 101 Va. 443, 44 S. E. 692 (1903); Amos v. Stockert, 47 W. Va. 109, 125, 34 S. E. 821 (1889); Davis v. Woods, 95 Miss. 432, 48 So. 961 (1909), applying Code 1906, § 10. since such a publication to the party himself tends to a breach of the peace: Edwards v. Wooton, 12 Rep. 35 (1608); Clutterbuck v. Chaffers, 1 Stark, 471 (1816); State v. Avery, 7 Conn. 207, 18 Am. Dec. 105 (1828); Fry v. McCord, 95 Tenn. 678, 33 S. W. 568 (1895).

15. Hebditch v. McIlwaine (1894), 2 Q. B. 54; 63 L. J. Q. B. 587.

16. Clutterbuck v. Chaffers, 1 Stark. 471 (1816); Warnock v. Mitchell, 43 Fed. 428 (1890); Spaits v. Poundstone, 87 Ind. 522 (1882); Yousling v. Dare, 122 Ia. 539, 98 N. W. 371 (1904); McIntosh v. Math-erly, 9 B. Mon. (48 Ky.) 119 (1848); Lyle v. Clason, 1 Caines (N. Y.) 581 (1804); Wilcox v. Moon, 64 Vt. 450, 24 At. 244 (1892). A sealed letter containing libellous matter, com-municated to no one but the party libelled, will sustain an indictment,

17. Shefill v. Van Deusen, 13 Gray (79 Mass.), 304 (1859).

18. Price v. Jenkins, Croke Eliz. 865 (1601); Mielenz v. Quasdorf, 68 Ia. 726, 28 N. W. 41 (1886); Wor-mouth v. Cramer, 3 Wend. (N. Y.) 394 (1829).

19. Clutterbuck v. Chaffers, 1 Starkie, 471 (1816).

20. Delacroix v. Thevenot, 2 Stark. 63 (1817); Kiene v. Ruff, 1 Ia. 482 (1855); Snyder v. Andrews, 6 Barb. (N. Y.) 43 (1849); Fry v. McCord, 95 Tenn. 678, 33 S. W. 568 (1895). If the writer of a defamatory let-

tiff makes out a *prima facie* case of publication, by showing that the libel was "contained on the back of a postal-card,"²¹ or by other evidence that "makes it a matter of reasonable inference that the libellous matter was brought to the actual knowledge of any third person."^{21a} The burden is then thrown upon the defendant of showing that it did not come to the knowledge of any third person.^{21b}

Intention on the part of defendant that third persons shall hear or read the defamatory statement is not essential. He may believe that he and the plaintiff are alone, yet if a secreted third person overhears the slanderous utterance, there is an actionable publication.²² He may intend to mail a defamatory letter to one about whom it is written, yet, if by inadvertence he mails it to a third person who reads it, there is publication.²³ So, there is publication, although the defendant intended to make the statement of another person than the plaintiff,²⁴ or intended to make a different

ter locks it in his desk, and a thief takes the letter and makes its contents known, this is not publication by the writer; *Pullman v. Hill* (1891), 1 Q. B. 524, 60 L. J. Q. B. 299, (opinion of Lord Esher); *Weir v. Hoss*, 6 Ala. 881 (1844). And if the person to whom the letter is sent makes public its contents, this is not publication by the writer; *Wilcox v. Moon*, 64 Vt. 450, 24 At. 244 (1892).

21. *Robinson v. Jones*, L. R. 4 Ir. 391 (1879); *Williamson v. Freer*, L. R. 9 C. P. 393, 43 L. J. C. P. 161 (1874). In *Fry v. McCord*, 95 Tenn. 678, 33 S. W. 568 (1895), it was held that "the sending of a writing in a sealed envelope, to the party himself," is not a publication "in the absence of averment and proof that it was read or heard read by others."

21a. Clerk and Lindsell, *Torts* (2d Ed.), p. 490.

21b. *Clutterbuck v. Chaffers*, 1 Stark. 471 (1816).

22. *Desmond v. Brown*, 33 Ia. 13, 15 (1871).

23. *Fox v. Broderick*, 14 Ir. C. L. 453 (1864).

24. *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392 (1895); *S. C.* 118 Cal. 366, 50 Pac. 541 (1897); *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 43 N. W. 431, 15 Am. S. R. 339 (1889); *Griebel v. Rochester Printing Co.*, 60 Hun, 319, 14 N. Y. Supp. 848 (1891); *Morey v. Morning Journal Assoc.*, 123 N. Y. 207, 25 N. E. 161, 9 L. R. A. 621 (1890); *Warner v. Press Pub. Co.*, 132 N. Y. 185, 30 N. E. 393 (1892); *Contra, Hanson v. Globe News Co.*, 159 Mass. 293, 34 N. E. 362 (1893), but see dissenting opinion of Holmes, Morton and Barker, JJ.

statement from that which he actually uttered,²⁵ or believed the occasion was privileged.²⁶

Communicating a defamatory statement to one spouse about the other is a legal publication,²⁷ but a communication by one spouse to the other is privileged,²⁸ although if it is overheard by a third person the privilege is forfeited and publication is made.²⁹

346. At common law, the place of publication of a newspaper libel is any county in which the paper is circulated. In other words, the victim is not bound to sue in the county where the paper is printed. Having chosen a particular county, in which to bring his action, all the damages done him by the libellous publication must be litigated in that suit.^{29a} By statute the publication of a libel and its circulation may amount to a single crime.^{29b}

347. **Alleging Publication.** It was settled at an early day, that no technical words are necessary in alleging publication. Accordingly, a declaration that defendant spoke the slanderous words in the presence of others, was held good, although there was no allegation that they were spoken in the hearing of others, the court saying, "it shall be necessarily intended that it was in the hearing when it was in the presence of others."³⁰ So an averment that

25. *Shepherd v. Whitaker*, L. R. 10 C. P. 502 (1875); *Upton v. Times Democrat*, 104 La. 141, 28 So. 970 (1900), "cultured gentleman" was mistakenly printed "colored gentleman;" *Nicholson v. Rust*, 52 S. W. 933, 21 Ky. L. R. 645 (1899).
26. *Hebditch v. McIlwain* (1894), 2 Q. B. 54, 63 L. J. Q. B. 587, overruling *Tompson v. Dashwood*, 11 Q. B. D. 43, 52 L. J. Q. B. 425 (1883).
27. *Wenman v. Ash*, 13 C. B. 836, 22 L. J. C. P. 190 (1853); *Schenck v. Schenck*, 1 Spencer (20 N. J. L.), 208 (1844); *Wilcox v. Moon*, 64 Vt. 450, 24 At. 244 (1892).
28. *Wennhak v. Morgan*, 20 Q. B. D. 635, 57 L. J. Q. B. 241 (1888); *Sesler v. Montgomery*, 78 Cal. 486, 21 Pac. 185 (1889); *Trumbull v. Gibbs*, 3 City H. Rec. (N. Y.) 97 (1818).
29. *State v. Shoemaker*, 101 N. C. 690, 8 S. E. 332 (1888).
- 29a. *Louisville Press Co. v. Tenny*, 105 Ky. 365, 49 S. W. 15 (1899); *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S. W. 496 (1908); *Meriwether v. Knapp & Co.*, 211 Mo. 199, 109 S. W. 750 (1908).
- 29b. *U. S. v. Press Pub. Co.*, 219 U. S. 1, 31 Sup. Ct. 212 (1911), punishable only in the State courts. *U. S. v. Smith*, 173 Fed. 227 (1909), applying sixth amendment of the Federal Constitution.
30. *Hall v. Hennesley*, Cro. Eliz. 486 (1596); *Miller v. Johnson*, 79 Ill. 58 (1875); *Burbank v. Horn*, 39 Me. 233, 235 (1855), accord.

defendant "openly and publicly promulgated" the statement was held sufficient.³¹ An allegation, that defendant caused the libel to be printed, charges publication, "because it calls in a third person, an agent, to whom it must have been communicated."³² For similar reasons, there is actionable publication, when a letter is dictated to a typewriter or stenographer,³³ or a telegram is transmitted.³⁴ In the latter case, the telegraph company publishes the libel, when one agent communicates it over the wire to another.³⁵ And it may be laid down as a general proposition, that where two or more persons take part in communicating defamation, there is a publication by each to the other;³⁶ though such communication may be privileged in some circumstances.^{36a}

348. Communication Which Is Not Publication. When the defamatory statement is made to a third person at the plaintiff's request, the publicity is chargeable to the plaintiff, not to the defendant.³⁷ If, however, the defendant communicates the defama-

31. *Taylor v. How*, Cro. Eliz. 861 (1601); *Ware v. Cartledge*, 24 Al. 622 (1854); *Goodrich v. Warner*, 21 Conn. 432 (1852); *Hurd v. Moore*, 2 Or. 85 (1863); *Benedick v. Westover*, 44 Wis. 404 (1878), accord.

32. *Baldwin v. Elphinstone*, 2 W. Bl. 1037 (1775). Cf. *Watts v. Fraser*, 7 A. & E. 223, 7 C. & P. 369, 1 M. & Rob. 449 (1835); *Sproul v. Pillsbury*, 72 Me. 20 (1880).

33. *Gambrill v. Schooley*, 93 Md. 48, 48 At. 730, 52 L. R. A. 87, 86 Am. St. R. 414 (1901); *Pullman v. Hill* (1891), 1 Q. B. 524, 63 L. J. Q. B. 299; *Ferdon v. Dickens*, 161 Ala. 181, 49 So. 888 (1909).

34. *Whitfield v. S. E. Ry., E. B. & E.* 115, 27 L. J. Q. B. 229 (1858); *Williamson v. Freer*, L. R. 9 C. P. 393, 43 L. J. C. P. 161 (1874).

35. *Peterson v. West. U. Tel. Co.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302 (1896), 72 Minn. 41, 74 N. W. 1022 (1898), 75 Minn. 368, 77 N. W. 985 (1899). If the dispatch does

not disclose that its purpose is defamatory, it is the duty of the company, as a quasi common carrier, to transmit it; the occasion is privileged and the company incurs no liability; *Nye v. W. U. T. Co.*, 104 Fed. 628 (1900). Otherwise, if the message is libellous on its face; *W. U. Tel. Co. v. Cashman*, 149 Fed. 367, 81 C. C. A. 5 (1906); see *infra*, Ch. XVI, § 2.

36. *Spalts v. Poundstone*, 87 Ind. 522, 525 (1882).

36a. *Edmondson v. Birch & Co.* (1907), 1 K. B. 371, 76 L. J. K. B. 346; *Ashcroft v. Hammond*, 132 App. Div. 3, 7 (1909), 197 N. Y. 488, 90 N. E. 1117 (1910).

37. *Warr v. Jolly*, 6 C. & P. 497 (1834); *Fonville v. McNease*, 1 Dud. (S. C.) 303, 32 Am. Dec. 49 (1838);

Howland v. Blake Manufacturing Co., 156 Mass. 543, 570, 31 N. E. 656 (1892); *Shinglemeyer v. Wright*, 124 Mich. 230, 82 N. W. 887 (1900).

In the last cited case, the court

tion to a third person, without knowledge that he is an agent of the plaintiff, there is actionable publication. The defendant cannot be heard to say, in such a case, that the publicity is the plaintiff's act.³⁸

A person, who voluntarily engages in "the interchange of opprobrious epithets and mutual vituperation and abuse," has been held to license his antagonist to a reply in kind.³⁹ "The right to answer a libel by libel is analagous to the right to defend oneself against an assault upon his person. The resistance may be carried to a successful termination, but the means used must be reasonable."⁴⁰ For any excess of defamation beyond that which is fairly incident to self-defense, the party originally attacked is answerable.⁴¹

349. Common carriers,⁴² news-vendors,⁴³ proprietors of circulat-

said: "There is no difference in principle between reading a letter to another, and soliciting a person to make a similar verbal statement. The maxim *volenti non fit injuria* applies." *Louisville Times Co. v. Lancaster*, 142 Ky. 122, 133 S. W. 1155 (1911).

38. *Duke of Brunswick v. Harmer*, 14 Q. B. 185 (1849); *Byam v. Collins*, 111 N. Y. 143, 19 N. E. 75 (1888).

39. *Bloom v. Crescioni*, 109 La. 667, 33 So. 724 (1903). Cf. *Laughton v. Bishop of Sudor*, L. R. 4 C. P. 495, 42 L. J. C. P. 11 (1872); *Wells v. Payne*, 141 Ky. 578, 133 S. W. 575 (1911).

40. *Fish v. St. Louis, etc., Co.*, 102 Mo. App. 6, 74 S. W. 641 (1903); *Koenig v. Ritchie*, 3 F. & F. 413 (1862); *Shepherd v. Baer*, 96 Md. 152, 53 At. 790 (1902); *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803 (1887).

41. *Brewer v. Chase*, 121 Mich. 526, 80 N. W. 575, 46 L. R. A. 397, 80 Am. S. R. 527 (1899): "It must not be supposed that when a libellous

article is published the person libelled is at once authorized to publish any and all kinds of charges against the offender, upon the theory that they tend to degrade him, and thereby discredit his libellous statements. If this were so, every libel might be answered in this way, and the most disgraceful charges made, the person making them being able to shelter himself behind his belief in their truth. The thing published must be something in the nature of an answer, like an explanation or denial. What is said must have some connection with the charge that is sought to be repelled." See *Poissenot v. Reuther*, 51 La. Ann. 965, 25 So. 937 (1899), limiting *Goldberg v. Dobberton*, 46 La. Ann. 1303 16 So. 192, 28 L. R. A. 721 (1894).

42. *Day v. Bream*, 2 Moo. & Rob. 54 (1837).

43. *Emmens v. Pottle*, 16 Q. B. D. 354, 55 L. J. Q. B. 51 (1885); *Weldon v. Times Book Co.* (1911), 28 T. L. R. 143.

ing libraries ⁴⁴ and others, who are not responsible for originating defamation, and are merely unconscious vehicles of its distribution, generally escape liability for its publication.⁴⁵ But, as pointed out by the courts, they are *prima facie* answerable, inasmuch as they have in fact delivered and put into circulation the defamatory matter complained of, and they are therefore called upon to show their ignorance of its existence,⁴⁶ and their freedom from negligence in the matter.⁴⁷

350. Repetition of Defamation. There is some authority for the view that in early English law, a person, who, at the time of repeating a defamatory statement, gave the name of its author, could justify his conduct.⁴⁸ This doctrine has long been exploded, both in England and in this country. It is now well established that every repetition of a defamatory statement is a new publication, subjecting the repeater to a separate action.⁴⁹ The dissem-

44. *Vizetely v. Mudie's Select Library* (1900), 2 Q. B. 170, 69 L. J. Q. B. 645.

45. *Smith v. Ashley*, 11 Met. (52 Mass.) 367 (1846). Defendant printed what appeared to be a fancy sketch, without any reason to believe it was a libel on plaintiff. But see *E. Hulton & Co. v. Jones* (1910), A. C. 20, 79 L. J. K. B. 198. Plaintiff recovered £1,750 damages from the publishers of an article defamatory of a fictitious person bearing plaintiff's name, though neither the writer nor the publisher knew of the plaintiff's existence, or intended any reference to him.

46. *Day v. Bream*, 2 Moo. & Rob. 54 (1837); *Staub v. Van Benthuyssen*, 36 La. Ann. 467, 469 (1884).

47. *Vizetely v. Mudie's Select Library* (1900), 2 Q. B. 170, 69 L. J. Q. B. 645. In this case, freedom from negligence was not shown.

48. *Northampton's Case*, 12 Co. 134 (1613). The latter part of the fourth resolution reads: "In a private action for slander of a common

person, if J. S. publish that he hath heard J. N. say that J. G. was a traitor or thief; in an action of the case, if the truth be such, he may justify." It will be observed that the name of the informant must have been given when the statement was made, so as to give the plaintiff his action in the first instance against the original author of the slander; *Woolworth v. Meadows*, 5 East, 463 (1803).

49. *McPherson v. Daniels*, 10 B. & C. 263, 34 R. R. 397 (1829); *Watkin v. Hall*, L. R. 3 Q. B. 396, 37 L. J. Q. B. 125 (1868); *Parker v. McQueen*, 8 B. Mon. (47 Ky.) 18 (1847); *Nicholson v. Rusk* (Ky.), 52 S. W. 933, 21 Ky. L. R. 645 (1899); *Staub v. Van Benthuyssen*, 36 La. Ann. 467 (1884); *Stevens v. Hartwell*, 11 Met. (52 Mass.) 542 (1846); *Inman v. Foster*, 8 Wend. (N. Y.) 602 (1832); *Folwell v. Providence Journal Co.*, 19 R. I. 551, 37 A. 6 (1896); *Sans v. Joerris*, 14 Wis. 663 (1861).

inator of scandal cannot take refuge behind rumor, or even the positive assertion of a trusted informant. He must be prepared to establish the truth of the defamatory statement (not the fact that he has repeated only what he heard and believed to be true), or pay damages for the injury which his scandal-mongering has inflicted upon the plaintiff.⁵⁰

While it is natural, and to be expected, that a defamatory statement will be repeated by those who hear or read it, the rule is settled that one is not liable for a third person's actionable and unauthorized repetition of his slander or libel.⁵¹ Of course, a person who actually authorizes the repetition of a libel or slander which he originates,⁵² is liable for such repetition, as he would be for any other tort of his procurement, and it is generally held that when a person publishes defamation to one, who is under a duty to repeat it to another, he is answerable for the repetition.⁵³ But where the repetition is not privileged, the burden of proof appears to be upon the plaintiff to show that the defendant actually authorized or requested the repetition.⁵⁴

^{50.} *Kelley v. Dillon*, 5 Ind. 426 (1854); *Lehrer v. Elmore* (Ky.), 37 S. W. 292 (1896); *Louisville Press Co. v. Tennelly*, 105 Ky. 365, 49 S. W. 15 (1899). In the last cited case, it is said: "The public good as well as the usefulness of the press, imperatively demand that no publication injurious to a citizen should ever be made, unless the publisher knows beyond a reasonable doubt that the statements or charges that it publishes are in fact true. It is a matter of public importance that all statements printed and published in the press of the day should be entitled to full faith and credence, and no paper should publish any matter calculated to injure the feelings, business, or standing of any citizen, unless the same be true; and the mere fact that such publisher may believe

that the statements or charges made are true, is no defense in law or morals."

^{51.} *McGregor v. Thwaites*, 3 B. & C. 24, 35 (1824); *Ward v. Weeks*, 7 Bing. 211, 4 M. & P. 796 (1830); *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208 (1890); *Bassell v. Elmore*, 48 N. Y. 561 (1872). See *supra*, ¶ 102.

^{52.} *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265 (1897).

^{53.} *Derry v. Handley*, 16 L. T. N. S. 263 (1867); *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208 (1890).

^{54.} *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97 (1891); *Schoepflin v. Coffey*, 162 N. Y. 12, 56 N. E. 502 (1900). The fourth head-note is as follows: "A person whom defendant knew to be a newspaper reporter approached him concerning

351. Joint Publication. If the publication of a libel is the result of the joint efforts of several persons, each is responsible for the wrong done to the plaintiff.^{54a} Accordingly, if A prepares a libel, and B prints it, and C publishes it, the victim may have a joint action against all, or may sue them separately.⁵⁵ The rules apply here which have been set forth in a former connection, relating to joint wrongdoers, to master and servant, to partners, to corporations and their managers.⁵⁶

352. Ordinarily, the publication of the same slander by different persons is not a joint tort, but is a separate and distinct wrong done by each slanderer.⁵⁷ Hence, if A utters slanderous words of

a report about plaintiff, stating that he understood that defendant had asserted the facts. Defendant repeated the assertion, but there was nothing said about the publication of the statement. Held insufficient to show that defendant intended his remarks to be published." Judge Vann dissented from the conclusion, that the evidence presented no question for the jury, as to whether he intended to cause or promote the publication of the words spoken to the newspaper reporter. According to Clerk & Lindsell's understanding of the English cases, the plaintiff made out a prima facie case against the defendant. See their treatise on Torts (2d Ed.), pp. 540-542; also, *Clay v. People*, 86 Ill. 147 (1877).

54a. *Noyes v. Thorpe*, 73 N. H. 481, 62 At. 787 (1906).

55. *Johnson v. Hudson*, 7 A. & E. 233 n., 1 H. & W. 680 (1836); *Watts v. Fraser*, 7 C. & P. 369, 7 A. & E. 223, 1 M. & Rob. 449, 2 N. & P. 157 (1835); *Thomas v. Rumsey*, 6 Johns. (N. Y.), 26 (1810); *Youmans v. Smith*, 153 N. Y. 214,

47 N. E. 265 (1897); *Cunningham v. Underwood*, 116 Fed. 803, 53 C. C. A. 99 (1902).

56. *Supra*, Ch. IV.; also, *Abrath v. N. E. Ry.*, 11 App. Cas. 247, 55 L. J. Q. B. 460 (1886); *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539, 27 Am. R. 293 (1877); *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543 (1899); *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692 (1903); *Compania, Etc. v. Houlder* (1910), 2 K. B. 354, 79 L. J. K. B. 1094; *Glasgow v. Lorimer* (1911), A. C. 209, 80 L. J. P. C. 175.

57. *Van Horn v. Van Horn*, 56 N. J. L. 318, 29 At. 669 (1893). The statement in this case, following *Chamberlain v. White*, Cro. Jac. 647 (1623), and *Coryton v. Lithebye*, 2 Wm. Saund, 117 c. (1682), and in *Blake v. Smith*, 19 R. I. 476, 34 At. 995 (1896), that "an action for slander will not lie jointly against two, because the words of one are not the words of another," is too broad. But see *Smith Bros. & Co. v. W. C. Agee & Co.*, Ala., 59 So. 647 (1912).

B, which are not actionable *per se*, and C's repetition of them causes B special damage, B can maintain an action only against C.⁵⁸

But there can be no doubt, upon principle, that, if A and C concertedly utter the same slander, at the same time, they are jointly liable; nor, if C utters the slander at A's request, or pursuant to authority from A, or to an understanding between them. And the weight of authority, it is submitted, sustains this doctrine.⁵⁹

§ 2. LIBEL AND SLANDER.

353. Two species of defamation are recognized by English law. That which is expressed in oral speech, or its equivalent, is called slander;⁶⁰ while the term libel is applied to defamation which is expressed in writing or print, or pictures, effigies or other visible and permanent forms.⁶¹

58. *Shurtleff v. Parker*, 130 Mass. (1875); *Gutsole v. Mathers*, 1 M. & 293, 39 Am. R. 454 (1881); *Gough v. Goldsmith*, 44 Wis. 262, 28 Am. R. 579 (1878); *Parkins v. Scott*, 1 H. & C. 152, 153, 31 L. J. Ex. 331 (1862); *Ward v. Weeks*, 7 Bing. 211, 4 M. & P. 796 (1830).

59. *Johnson v. Hudson*, 7 A. & E. 233 n., 1 H. & W. 680 (1836); and the authorities cited in the three preceding notes; Clerk and Lindsell, *Torts* (2d Ed.), p. 491; Odgers, *Libel and Slander* (5th Ed.), pp. 601-2. In *Cushing v. Hederman*, 117 Ia. 637, 91 N. W. 940 (1902), the court appears to assume that a husband and wife might be joint wrongdoers in the publication of slanderous words. In *Haney Mfg. Co. v. Perkins*, 78 Mich. 1, 43 N. W. 1073 (1889), it was declared that if one partner, in the course of the firm's business slanders another, "the partnership is liable therefor just as it might be for any other tort," and a joint action against all the partners will lie.

(1875); *Gutsole v. Mathers*, 1 M. & 293, 39 Am. R. 454 (1881); *Gough v. Goldsmith*, 44 Wis. 262, 28 Am. R. 579 (1878); *Parkins v. Scott*, 1 H. & C. 152, 153, 31 L. J. Ex. 331 (1862); *Ward v. Weeks*, 7 Bing. 211, 4 M. & P. 796 (1830).

61. *Iron Age Publ'g Co. v. Crudup*, 85 Ala. 519, 5 So. 332 (1888). In *Case de Libellis Famosis*, 5 Coke, 125 b. (1606), it is said: "Every infamous libel *aut est in scriptis*, *aut sine scriptis*; a scandalous libel *in scriptis* is, when an epigram, rhyme, or other writing is composed or published to the scandal or contumely of another, by which his fame and dignity may be prejudiced. And such libel may be published: 1. *Verbis aut cantilenis*, as where it is maliciously repeated or sung in the presence of others. 2. *Traditione*, when the libel or any copy of it is delivered over to scandalize the party. *Famosus libellus sine scriptis* may be: 1. *Picturis*, as to paint the party in any shameful and ignominious manner. 2. *Signis*, as to fix a gallows, or other reproachful and ignominious signs at the party's door or elsewhere;"

60. *Pollard v. Lyon*, 91 U. S. 225 *Wandt v. Hearst's Chicago Ameri-*

The legal distinction between these two species is not limited to their differences in form. It is even more striking and important when their consequences are considered.

Libel is a criminal offense as well as a tort; while the slander of private persons has never been deemed a common-law crime.⁶² Some forms of slander have been declared crimes by statute, such as "falsely and maliciously or falsely and wantonly imputing to any female a want of chastity,"^{62a} or falsely and maliciously charging another with the commission of a felony, or any other indictable offense involving moral turpitude.^{62b}

354. Many a statement, which is actionable in the form of a libel, is not actionable as a slander. Sir James Mansfield once declared,⁶³ that upon principle, he could not "make any difference between words written and words spoken, as to the right which arises on them of bringing the action." He refers to the reasons usually assigned for the distinction in the following passage: "So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of malignity, but for the damage sustained. So it is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as in Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter: it is true that a newspaper may be very generally read, but that is all casual." However, he admits that the distinction between written and spoken scandal

can, 129 Wis. 419, 109 N. W. 70 (1906). In this case, plaintiff's picture was printed over an article defamatory of another person, and the libel thus connected with the plaintiff; *Peck v. Tribune Co.*, 214 U. S. 185, 29 Sup. Ct. 554 (1909), picture of plaintiff in connection with advertisement of Duffy's Pure Malt Whiskey.

62. *Reg. v. Holbrook*, 4 Q. B. D. 42, 48 L. J. Q. B. 113, 14 Cox C. C. 185 (1878); New York Pen. Code, § 242. "It is only when slander is

blasphemous, seditious or obscene that the State is concerned to interfere and punish the speaker;" *Odgers, Libel and Slander* (5th Ed.) p. 7.

62a. *Curl v. State*, Tex. Civ. App. , 145 S. W. 602 (1912), applying Penal Code, Art. 1180.

62b. *Dungan v. State*, 2 Ala. App. 235, 57 So. 117 (1911), applying Crim. Code, § 7340.

63. *Thorley v. Lord Kerry*, 4 Taunt. 355, 3 Camp. 214 n. (1812).

"has been established by some of the greatest names known to the law, Lord Hardwicke,⁶⁴ Hale,⁶⁵ I believe Holt, C. J., and others."⁶⁶ The same view obtains in this country.^{66a}

In accordance with this distinction, words of mere suspicion⁶⁷ or which amount to an accusation of dishonest, vicious or immoral conduct which falls short of being criminal,⁶⁸ are not actionable, when spoken, although they would be if published in writing or print. An oral charge of false swearing, which does not import perjury in a legal sense, is not actionable;⁶⁹ but the same charge becomes actionable when published in a paper.⁷⁰ To say of a man in writing that he has the itch and smells of brimstone, is an actionable libel; but to say the same words orally would not be actionable slander.⁷¹ To charge one with being an anarchist is actionable in the form of libel, but not in the form of slander.⁷² So to call a white man a colored man, or a negro, may be actionable if the false statement is written or printed,^{72a} but not if it is oral.^{72b}

64. *Bradley v. Methwyn*, Selw. N. lewdness, it is also suggestive of P. 982 (7th Am. Ed. 1045, n. 1), drunkenness, of dishonesty, of viciousness, and of other moral infirmities and derelictions." (1737).

65. *King v. Lake*, 2 Vent. 28, ities and derelictions." Hardr. 470 (1672).

66. *Austin v. Culpepper*, 2 Shower, 313, Skin, 123 (1683); argued **69.** *Ward v. Clark*, 2 Johns. (N. Y.) 10 (1806).

for plaintiff by Holt, who cited **70.** *Steele v. Southwick*, 9 Johns. (N. Y.) 214 (1812).

King v. Lake, supra. **71.** *White v. Nichols*, 3 How. (U. S.) 266, 285-6 (1845), citing *Villers v. Monsley*, 2 Wils. 403 (1769).

66a. *Ukman v. Daily Record Co.*, 189 Mo. 378, 88 S. W. 60 (1905), and **72.** *Cerveney v. Chic. Daily News*, 139 Ill. 345, 13 L. R. A. 864, 28 N. E. 692 (1891); *Lewis v. Daily News Co.*, 81 Md. 466, 32 At. 246 (1895). Cf. *Browning v. Comm.*, 116 Ky. 282, 76 S. W. 19 (1903).

authorities digested in the opinion. **72a.** *Upton v. Times Democrat*, Pub. Co., 104 La. 141, 28 So. 970 (1900); *Flood v. News & Courier Co.*, 71 S. C. 112, 50 S. E. 637 (1904); *Express Pub. Co. v. Orsborn*, Tex. Civ. App. , 151 S. W. 574 (1912).

67. *Haynes v. Clinton Printing Co.*, 169 Mass. 512, 48 N. E. 275 (1897), referring to cases cited by defendant.

68. *Blake v. Smith*, 19 R. I. 476, 34 At. 995 (1896): "To say of the plaintiff's wife that 'she is a bad

woman, and a disgrace to the neighborhood, and ought not to be allowed on the street,' and that 'she is a damned bitch,' is not to charge her with the commission of any offense known to the law; for, while

said language may be suggestive of

355. Definition of Civil⁷³ Libel. It has long been established that "scandalous matter is not necessary to make a libel. It is enough if the defendant induces an ill opinion to be held of the plaintiff, or to make him contemptible or ridiculous."⁷⁴ Any censorious or ridiculing writing, picture or sign made intentionally and without just cause and excuse is a libel upon its victim.⁷⁵ The degree of censure or ridicule is not material.⁷⁶ If the language is such that others, knowing the circumstances, would reasonably think it defamatory of the person complaining of and injured by it, then it is actionable.^{76a} "To allow the press to be the vehicle of malicious ridicule of private character, would soon deprave the moral taste of the community and render the state of society miserable."⁷⁷

356. Oftentimes, a libel is not aimed at one's personal character, but affects him chiefly or solely in his office or vocation.⁷⁸ In

974, with case note (1911); but see *Sportono v. Fourchion*, 40 La. Ann. 424, 4 So. 71 (1888).

73. The distinction between civil and criminal libel has not always been observed by judges and writers. Defamation of the memory of the dead is often included in the definition of civil libel; *Smith v. Bradstreet Co.*, 63 S. C. 525, 41 S. E. 763 (1902). But it is well settled that no civil action lies for such defamation; *Bradt v. News Nonpareil Co.*, 108 Ia. 449, 79 N. W. 122 (1899); *Wellman v. Sun Publishing Co.*, 66 Hun, 331, 21 N. Y. Supp. 577 (1892).

74. *Cropp v. Tilney*, 3 Salk. 225 (1693).

75. *Villers v. Monsley*, 2 Wils. 403 (1769); *Riggs v. Denniston*, 3 Johns. Cas. 198, 205 (1802); *People v. Crosswell*, 3 Johns. Cas. 337, 354 (1804); *Watson v. Trask*, 6 Oh. 531 (1834).

76. *Cooper v. Greeley*, 1 Den. (N. Y.) 347 (1845): "Mr. Cooper will have to bring his action to trial

somewhere. He will not bring it in New York, for we are known here, nor in Otsego, for he is known there."

76a. *Hulton & Co. v. Jones* (1910), 1 K. B. 20, 23, 79 L. J. K. B. 198, affirming (1909), 2 K. B. 444, 78 L. J. K. B. 937.

77. *Steele v. Southwick*, 9 Johns. 214 (1812).

78. *McLoughlin v. Am. Circular Loom Co.*, 125 Fed. 203, 60 C. C. A. 87 (1903), Lowell, J., said: "We are of the opinion that the language here used is susceptible of a defamatory meaning. In substance it was this: That the plaintiff had installed electric wires contrary to the rules of the New Orleans Board of Underwriters. The letter thus charged the plaintiff with violating the rules of the insurance companies, and it is matter of common knowledge that the owner of a house wired in a manner not permitted by these rules may well be unable to insure it. As most house

such cases it may be necessary to inquire whether the statement complained of necessarily imports damage to the plaintiff, or whether he must allege and prove, in addition to the publication, special damage.^{78a} This class of libels involves the distinction, between statements actionable *per se* and those actionable only when they cause special damage, which we shall find of especial importance in cases of slander. Libels upon personal character, however, are always actionable unless privileged. The law assumes that they harm the victim, and relieves him from the necessity of alleging or proving actual damage.⁷⁹ Of this class is a publication falsely charging the plaintiff with an unwillingness to pay his just debts.^{79a}

357. Libels Affecting One's Vocation. In many cases of libels, which affect the victim chiefly or solely in his office or vocation, their tendency to cause legal injury may be so clear, as to render allegation and proof unnecessary. Imputing insanity,⁸⁰ or incom-

owners desire insurance, and wish that their electric wires should be so arranged as to make insurance possible, the plaintiff's evidence, admissible under the allegations of his declaration, might warrant a jury in finding that the defendant's letter suggested that the plaintiff so conducted his business as to make inadvisable his employment by one having the ordinary desires of a householder. There is no conclusive presumption that damage results from the language used, and so that language is not libellous *per se*."

78a. *Stannard v. Wilcox & Gibbs S. M. Co.*, Md. , 84 At. 335 (1912), and cases therein discussed; *Crashley v. Press Pub. Co.*, 197 N. Y. 27, 71 N. E. 258 (1904).

79. *Austin v. Culpepper*, 2 Shower, 313, Skin, 123 (1683); *Bell v. Stone*, 1 Bos. & P. 331 (1798); *Iron*

Age Pub. Co. v. Crudup, 85 Al. 519, 5 So. 332 (1888); *Wynne v. Parsons*, 57 Conn. 73, 17 At. 362 (1889); *Prewitt v. Wilson*, 128 Ia. 198, 103 N. W. 365. That plaintiff was not worthy of belief under oath; *Weeks v. News Pub. Co.*, 117 Md. 126, 83 H. 162 (1912); *Bee Pub. Co. v. Shields*, 68 Neb. 750, 94 N. W. 1029 (1903); *Holmes v. Jones*, 147 N. Y. 59, 41 N. E. 409 (1895); *Gates v. N. Y. Rec. Co.*, 155 N. Y. 228, 49 N. E. 769 (1898); *Solverson v. Peterson*, 64 Wis. 128, 25 N. W. 14 (1885).

79a. *Ferdon v. Dickens*, 161 Ala. 181, 49 So. 888 (1909).

80. *Morgan v. Lingen*, 8 L. T. R. N. S. 800 (1863); *Totten v. Sun Pub. Assoc.*, 109 Fed. 289 (1901); *Southwick v. Stevens*, 10 Johns (N. Y.), 443 (1813); *Moore v. Francis*, 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. S. R. 810 (1890).

petency⁸¹ to a professional man, or insolvency⁸² to a trader, or asserting that a merchant has given a chattel mortgage or other security upon his stock,⁸³ or that a public officer has been guilty of dishonest, corrupt conduct,⁸⁴ is a libel actionable *per se*. On the other hand, a false statement that a person, not a trader, owed a debt,⁸⁵ or that a judgment had been recovered against a merchant,⁸⁶ is not actionable without allegation and proof of special damage, unless the circumstances warrant the inference that the defendant charged the plaintiff with inability to pay his just debts,⁸⁷ or with conduct which would "naturally injure his standing in the community and lower him in the esteem of his neighbors."⁸⁸ The natural effect of falsely publishing in a newspaper that a dentist had committed suicide would seem to be pecuniary injury to him in his business;^{88a} but a publication falsely stating that a person, not engaged in business, has died has been held not actionable, without proof of special damages.^{88b}

358. Libel of a Class. When a libellous publication is directed against a class or body of persons, such as the commissioners

81. *Tarleton v. Lagarde*, 46 La. (1894); *Hunt v. Star Newspaper Co.* Ann. 1368, 16 So. 180, 26 L. R. A. (1909), 2 K. B. 309, 77 L. J. K. B. 325, 49 Am. S. R. 353 (1894); *Mat-* 732.

tice v. Wilcox, 147 N. Y. 624, 42 N. E. 270 (1895); *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. R. 317 (1900); *Holland v. Flick*, 212 Pa. 201, 61 At. 828 (1905). A detective was charged with cowardice. *Dakhyl v. Labouchere* (1909), 2 K. B. 325 n., 77 L. J. K. B. 728. A physician was called "a quack of the rankest species."

82. *Read v. Hudson*, 1 *Ld. Rayn.* 610 (1699); *Met. Omnibus Co. v. Hawkins*, 4 H. & N. 87, 28 L. J. Ex. 201 (1859); *Simons v. Burnham*, 102 Mich. 189, 60 N. W. 476 (1894).

83. *Smith v. Bradstreet Co.*, 63 S. C. 525, 41 S. E. 763 (1902); *Ukman v. Daily Record Co.*, 189 Mo. 378, 88 S. W. 60 (1905); *Simons v. Burn-*

85. *Fry v. McCord*, 95 Tenn. 678, 33 S. E. 569 (1895).

86. *Woodruff v. Bradstreet*, 116 N. Y. 217, 2 N. E. 354 (1889); *Searles v. Scarlett* (1892), 2 Q. B. 56, 61 L. J. Q. B. 573.

87. *Williams v. Smith*, 22 Q. B. D. 134, 58 L. J. Q. B. 21 (1888).

88. *McDermott v. Union Credit Co.*, 76 Minn. 84, 78 N. W. 967 (1899).

88a. *Cady v. Brooklyn Union Pub. Co.*, 23 Misc. (N. Y.) 409. It was held also to be a libel upon reputation.

88b. *Cohen v. New York Times Co.*, 153 App. Div. 242, 138 N. Y. Supp. 206 (1912), reversing 74 Misc. 618 (1911). *Contra, McBride v. El-* 112, 9 S. C. 313 (1856).

of a county,⁸⁹ or the medical staff of a public hospital,⁹⁰ any member of the class or body may maintain an action therefor.⁹¹ Not so if the class is of indefinite membership.^{91a}

358a. Libel of Outlaw: Of Corporation. A libel upon one, in respect of a vocation which is illegal, is not actionable. "The law of libel is not designed to shield one in the practice of an illegal business."⁹²

It has been judicially declared that a corporation differs from a natural person, in that it has no character to be affected by a libel;^{92a} but if the defamatory charge directly affects its credit, thus injuring its business reputation, the charge is actionable without proof of special damage.^{92b}

359. Province of the Court and the Jury. It is sometimes said that it is a pure question of fact for the jury, whether a particular publication comes within the definition of a libel. Such a statement does not accord with the weight of authority either in England or in this country. In civil actions, as distinct from criminal prosecutions⁹³ for libel, it is the province of the court, not simply to give to the jury a correct definition of libel, but to con-

^{89.} *Wofford v. Meeks*, 129 Ala. P. 284 (1800); *Collins v. Carnegie*, 349, 30 So. 625, 55 L. R. A. 214, 87 1 A. & E. 695, 3 N. & M. 703 (1834), Am. St. R. 66 (1901). accord.

^{90.} *Bornmann v. Star Co.*, 174 N. Y. 212, 66 N. E. 723 (1903).

^{91.} *Hardy v. Williamson*, 86 Ga. 551, 12 S. E. 874, 22 Am. St. R. 479 (1891).

^{91a.} *Watson v. Detroit Journal*, 143 Mich. 430, 107 N. W. 81, 5 L. R. A. N. S. 480, and case note. "Trading stamp concerns" generally but no particular concern.

^{92.} *Weltmer v. Bishop*, 171 Mo. 110, 71 S. W. 167 (1902), citing *Johnson v. Simonton*, 43 Cal. 242 (1872), and *Perry v. Man*, 1 R. I. 263 (1849); *Lathrop v. Sundberg*, 62 Wash. 136, 113 Pac. 574 (1911). Osteopath practicing in violation of law; *Morris v. Langdale*, 2 Bos. &

^{92a.} *Reporters' Ass'n of Am. v. Sun Printing Ass'n*, 186 N. Y. 437, 79 N. E. 710 (1906).

^{92b.} *Ibid.*, *South Hetton Coal Co. v. North Eastern News Ass'n* (1894), 1 Q. B. 133, 63 L. J. Q. B. 293.

^{93.} For learned discussions of the province of the court and jury in such prosecutions, see *Sparf v. United States*, 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343 (1895); *Roesel v. State*, 62 N. J. L. 216, 41 At. 408 (1898); *People v. Sherlock*, 166 N. Y. 180, 59 N. E. 830 (1901); *State v. Burpee*, 65 Vt. 1, 25 At. 964 (1892); *McCloskey v. Pulitzer Pub. Co.*, 152 Mo. 339, 53 S. W. 1087 (1899).

strue the particular publication.⁹⁴ Hence, if, in the opinion of the court, the language is not susceptible of a defamatory meaning, it should nonsuit the plaintiff.⁹⁵ On the other hand, if the publication is clearly libellous, in the opinion of the court, it should so charge the jury, leaving to them only the assessment of damages.⁹⁶ If, however, the language or circumstances of the publication render its defamatory character uncertain, the question of libel or no libel is for the jury,⁹⁷ and the jury should have the entire publication before it for construction.^{97a}

94. *Wofford v. Meeks*, 129 Al. 349, 30 So. 625 (1901); *Haynes v. Clinton Printing Co.*, 169 Mass. 512, 48 N. E. 275 (1897); *Trebbv v. Publishing Co.*, 74 Minn. 84, 76 N. W. 961, 73 Am. S. R. 330 (1898); *Alwin v. Liesch*, 86 Minn. 281, 90 N. W. 404 (1902); *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526 (1900); *Blake v. Smith*, 19 R. I. 476, 34 At. 995 (1896); *Robertson v. Edelstein*, 104 Wis. 440, 443, 80 N. W. 724 (1899); *Morgan v. Halberstadt*, 60 Fed. 592, 9 C. C. A. 147 (1894).

95. *Capital and Counties Bank v. Henty*, 7 App. Cas. 741, 52 L. J. Q. B. 232 (1882); *Quinn v. Prudential Ins. Co.*, 116 Ia. 522, 90 N. W. 349 (1902); *Moore v. Francis*, 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. S. R. 810 (1890); *Crashley v. Press Pub. Co.*, 179 N. Y. 27, 71 N. E. 258 (1904).

96. *Trebbv v. Pub. Co.*, 74 Minn. 84, 76 N. W. 961, 73 Am. S. R. 330 (1898); *Alwin v. Liesch*, 86 Minn. 281, 90 N. W. 104 (1902). In *Heller v. Pulitzer Pub. Co.*, 153 Mo. 205, 54 S. W. 457 (1899), it is said, following the English rule as stated by Lord Blackburn in *Capital, Etc. Bank v. Henty*, 7 App. Cas. 741, 52 L. J. Q. B. 232 (1882): "While

the court may sustain a demurrer to the plaintiff's petition, or nonsuit the plaintiff on the trial, or sustain a motion in arrest of a judgment against the defendant, it cannot direct a verdict for the plaintiff in a libel case. In this respect, libel cases differ from other cases." It is admitted by the court that this doctrine is not applied in cases of slander, as the provision of the Missouri constitution, making the jury judges of the law as well as the facts, is limited to libel cases. See *State v. Tolley*, N. D. , 136 N. W. 784 (1912). "The jury must accept the law from the courts, and apply such law to the facts."

97. *Press Pub. Co. v. McDonald*, 55 Fed. 264 (1893), 63 Fed. 238, 11 C. C. A. 155 (1894); *Mosler v. Stoll*, 119 Ind. 244, 20 N. E. 752 (1889); *Quinn v. Prudential Ins. Co.*, 116 Ia. 522, 90 N. W. 349 (1902); *Bee Pub. Co. v. Shields*, 68 Neb. 750, 94 N. W. 1029 (1903); *Warner v. Southall*, 165 N. Y. 496, 59 N. E. 269 (1901); *Bourreseau v. Journal Co.*, 63 Mich. 425, 30 N. W. 376, 6 Am. S. R. 320 (1886).

97a. *Berger v. Freeman Tribune Co.*, 132 Ia. 290, 109 N. W. 784 (1906).

360. Liberty of Speech and Press. Constitutional provisions, guaranteeing the liberty of speech and press, do not affect the rules set forth above. It has been judicially declared that, "While the liberty of each is a sacred right, dear to the hearts of the entire Anglo-Saxon civilization, yet the law-makers and the framers of constitutions have all realized that liberty in the exercise of any natural right, when unrestrained by law, leads to licentiousness, and have therefore wisely provided that any one exercising the liberty of speech, or of the press within this State, shall be held responsible for an abuse of such privilege."⁹⁸

We shall see later^{98a} that the courts in this country will not enjoin the threatened publication of a libel. But this doctrine, it is believed, does not apply when the threatened publication is part of a boycott, or other illegal enterprise.^{98b} Nor does freedom of the press secure the right to persons to send defamatory matter through the mails.^{98c}

361. Language to Be Construed in Its Ordinary Sense. In early English law, the rule was observed that, "when the words may have a good construction, you shall never construe them to an evil sense."⁹⁹ The purpose of the rule was "to avoid vexatious actions."¹⁰⁰ Later, however, the judges became convinced that the

⁹⁸. *Bee Publishing Co. v. Shields*, 68 Neb. 750, 94 N. W. 1029 (1903); *Cardarelli v. Prov. Jour. Co.*, 33 R. I. 268, 80 At. 583 (1911).

^{98a}. *Infra*, Ch. XVII, § 5.

^{98b}. *M. Steinert & Sons v. Tagen*, 207 Mass. 394, 93 N. E. 584 (1911); *Am. Fed. of Labor v. Buck's Stove & R. Co.*, 33 App. D. C. 83 (1909); *Gompers v. Buck's Stove & R. Co.*, 221 U. S. 418, 438, 31 Sup. Ct. 492 (1910). *Contra*, *Marx & H. J. C. Co. v. Watson*, 168 Mo. 133, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. R. 440 (1901); *Lindsay v. Montana Fed. of L.*, 37 Mont. 264, 96 Pac. 127, 18 L. R. A. N. S. 707 (1910).

^{98c}. *Warren v. U. S.*, 183 Fed. 718, 106 C. C. A. 156 (1910).

⁹⁹. *Brough v. Dennison*, Gold. 143 (1601), holding the words "Thou hast stolen by the highwayside" not actionable; *Popham, J.*, ingeniously suggesting "for it may be taken that he stole upon a man suddenly;" and *Fenner, J.*, with equal ingenuity suggesting: "And it may be intended he stole a stick under a hedge, and these words are not so slanderous that they are actionable."

¹⁰⁰. *Pratt, C. J.*, in *Button v. Heyward*, 8 Mod. 24 (1722), and *Scarlett, arguendo* in *Woolworth v. Meadows*, 5 East, 463 (1803). This view had been repudiated in some cases, such as *Toose v. St. Cro. Jac.* 306 (1613).

rule was unsound in principle, and harmful in results. Lord Holt announced that, "where words tend to slander a man and take away his reputation, he should be for supporting actions for them, because it tends to preserve the peace."¹ Lord Mansfield declared, "where words from their general import appear to have been spoken with a view to defame a party, the court ought not to be industrious, in putting a construction upon them different from what they bear, in the common acceptance and meaning of them." Early in the last century Lord Ellenborough observed: "The rule which at one time prevailed, that words are to be understood in *mitiori sensu*, has long been superseded: and words are now construed by courts as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them."³

362. This principle of construction is now observed by all courts.⁴ Accordingly, the inquiry of a judge or jury is not confined to the secret thought of the defendant, but to the effect of his utterance upon the plaintiff's reputation; and that effect is to

1. *Baker v. Pierce*, 2 Ld. Ray. 959 (1703), holding actionable the words "John Baker stole my boxwood, and I will prove it." In *Townsend v. Hughes*, 2 Mod. 159 (1676), it was held that "words should not be construed either in a rigid or mild sense, but according to the natural and general meaning." In *Naben v. Mlecock*, Skin. 183 (1683), Levinz, J., declared that he was "for taking words in their natural, genuine, and usual sense, and common understanding, and not according to the witty construction of lawyers."

2. *Peake v. Oldham*, Cowp. 275, affirming *Oldham v. Peake*, 2 Blackstone, 959 (1774). In such a case, the better view is that "the court may, as a matter of law, declare to the jury that the words are libelous;" *Dowie v. Priddle*, 216 Ill. 553, 75 N. E. 243 (1905).

3. *Roberts v. Camden*, 9 East, 93 (1807). The words spoken by defendant were, "he is under a charge of proscution for perjury;" and the court ruled that they were calculated to convey the imputation of perjury actually committed by the plaintiff.

4. *Wofford v. Meeks*, 129 Ala. 349, 30 So. 625 (1901); *Jones v. McDowell*, 4 Bibb (Ky.), 188 (1815); *Thompson v. Sun Pub. Co.*, 91 Me. 203, 39 At. 556 (1898); *West v. Hanrahan*, 28 Minn. 385, 10 N. W. 415 (1881); *World Pub. Co. v. Mullen*, 43 Neb. 126, 61 N. W. 108 (1894); *Turrill v. Dolloway*, 17 Wend. (N. Y.) 426 (1837); *Reld v. Providence Journal Co.*, 20 R. I. 120, 37 At. 637 (1897); *Clute v. Clute*, 101 Wis. 137, 76 N. W. 1114 (1898).

be determined by the sense, which readers or hearers of common and reasonable understanding would ascribe to it.⁵ This sense, it is to be borne in mind, will depend very much upon the circumstances attending the utterance. These may indicate that the statement complained of was clearly a joke,⁶ or was so extravagant by reason of momentary passion, as not to convey its normal meaning;⁷ or, on the other hand, that it was intended to convey a covert or hidden meaning, which would be understood by those to whom it was addressed, while wearing a harmless appearance to others.⁸ Such a situation generally presents a question for the jury.^{8a}

363. The Office of Innuendo. When the defamatory character of an utterance is latent, it is necessary for the plaintiff to explain the disingenuous words and phrases and disclose their true meaning.⁹ This he does, by properly alleging those "extrinsic facts

5. *Hankinson v. Bilby*, 16 M. & W. 442, 2 C. & K. 440 (1847); *Jarnigan v. Fleming*, 43 Miss. 710 (1871); *Phillips v. Barber*, 7 Wend. (N. Y.) 439 (1831).

6. *Donoghue v. Hayes* (Ir. Exch.), *Hayes*, 265 (1831): "The principle is clear that a person shall not be allowed to murder another's reputation in jest. But if the words be so spoken that it is obvious to every bystander, that only a jest is meant, no injury is done, and consequently no action will lie." *Accord*, *Triggs v. Sun Printing & Pub. Co.*, 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. R. 841 (1904), and note; *Holm v. Holm*, 146 App. Div. 75, 130 N. Y. Supp. 670 (1911). Applying the same principle, defamation by one afflicted with "great and notorious lunacy" should not be actionable, and such is the view generally held in this country; *Yeates v. Road*, 4 Blackf. (Ind.) 463 (1838); *Dickinson v. Barber*, 9 Mass. 225 (1812); *Bryant v. Jackson*, 6 Humph. (Tenn.) 199 (1845); *Horner*

v. Marshall, 5 Mumf. (19 Va.) 466 (1817), while in England it has been judicially declared, that lunacy is not a defense to an action for libel or slander; *Mordaunt v. Mordaunt*, 39 L. J. Prob. & M. 59 (1870).

7. *Austral. Newspaper Co. v. Bennett* (1894), A. C. 284, 63 L. J. P. C. 105; *Ritchie v. Stenius*, 73 Mich. 563, 41 N. W. 687 (1889); *Mihojevich v. Badechtel*, 48 La. Ann. 618, 19 So. 672 (1896).

8. *Hanchett v. Chiatovich*, 101 Fed. 742, 41 C. C. A. 648 (1900); *Hickinbotham v. Leach*, 10 M. & W. 361, 2 Dowl. N. S. 270 (1842); *Cooper v. Greely*, 1 Den. (N. Y.) 347 (1845).

8a. *Cain v. Shutt*, 105 Md. 304, 66 At. 24 (1907); *Battles v. Tyson*, 77 Neb. 563, 110 N. W. 299 (1906); *Warner v. Southall*, 165 N. Y. 496, 59 N. E. 269 (1901).

9. *Sweetapple v. Jesse*, 5 B. & Ad. 27, 2 N. & M. 36 (1833); *Rawlings v. Norbury*, 1 F. & F. 341 (1851); *Over v. Shiffing*, 102 Ind. 191, 26 N. E. 91 (1885); *Quinn v. Prud. Ins.*

and circumstances in the past and present relations of the parties, or the facts surrounding the publication, by which the jury shall be justified in giving to words, not ordinarily actionable, a slanderous or libelous signification.”¹⁰ While this portion of the complaint, known as the innuendo, is often important, it is to be remembered that “the meaning of words cannot be extended by innuendo beyond their natural import, aided by reference to the extrinsic facts with which they may be connected.”¹¹ Moreover, when the plaintiff has assigned a particular meaning to words, by this part of his pleading, he is limited to such meaning,¹² unless the language is clearly libelous.¹³

§ 3. SLANDER.

364. The Peculiarities of Slander. Some of these have been stated in preceding paragraphs. The most striking of them, how-

Co., 116 Ia. 522, 90 N. W. 349 (1902); Belknap v. Ball, 83 Mich. 583, 47 N. W. 674, 11 L. R. A. 72, 21 Am. S. R. 622 (1890); Mason v. Mason, 4 N. H. 110, 113 (1827); Hemmens v. Nelson, 138 N. Y. 517, 34 N. E. 342 (1893); Crashley v. Press Pub. Co., 179 N. Y. 27, 71 N. E. 258 (1904).

10. Quinn v. Prud. Ins. Co., 116 Ia. 522, 90 N. W. 349 (1902); Penry v. Dozier, 161 Ala. 292, 49 So. 909 (1909); Hanchett v. Chiatovich, 101 Fed. 742, 41 C. C. A. 648 (1900); Lewis v. Daily News Co., 81 Md. 466, 32 At. 246 (1895): “To falsely publish that plaintiff ‘would be an anarchist if he thought it would pay,’ explained by innuendoes to mean that plaintiff, for a money consideration, would engage in the unlawful, treasonable, and felonious designs of anarchists, and that an anarchist is a person who, actuated by mere lust of plunder, seeks to overturn by violence all constituted forms and institutions of society

and law and order, and all right of property, is libellous.” The opinion in Penry v. Dozier, *supra*, notes the meaning of inducement, colloquium, and innuendo in common law pleading.

11. Camp v. Martin, 23 Conn. 86, 92 (1854); McLaughlin v. Fisher, 136 Ill. 111, 24 N. E. 60 (1890); Moffatt v. David, 78 Ind. 445, 41 Am. R. 587 (1881); Simons v. Burnham, 102 Mich. 189, 60 N. W. 476 (1894); Pelton v. Ward, 3 Caines (N. Y.) 73, 2 Am. Dec. 251 (1805); Woodruff v. Bradstreet Co., 116 N. Y. 217, 22 N. E. 354 (1889); Blake v. Smith, 19 R. I. 476, 34 At. 995 (1896).

12. Simmons v. Mitchell, 6 App. Cas. 156, 50 L. J. P. C. 11 (1881); Brown v. Tribune Assoc., 74 App. Div. 359, 77 N. Y. Supp. 461 (1902).

13. Morrison v. Smith, 177 N. Y. 366, 69 N. E. 725 (1904). In such a case, the defendant is in no worse position, than if the innuendo were not in the complaint.

ever, are connected with the distinction which the common law¹⁴ makes between spoken words which are actionable *per se*, and those which are actionable only upon proof that they have caused special damage to the person defamed. Not a few of these peculiar characteristics are quite arbitrary and not to "be supported upon any satisfactory principle."¹⁵

365. Words Actionable Per Se. These have been classified under four heads by the United States Supreme Court: (1) "Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge be true, may be indicted and punished: (2) Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude him from society: (3) Defamatory words falsely spoken of a person which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such office or employment; (4) Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade."¹⁶ We will discuss them in the order named.

366. Words Imputing Crime. The diversity of judicial opinion as to what words imputing the commission of a crime are actionable *per se*, has long been the subject of comment.¹⁷ In the latter part of the fifteenth century the Court of King's Bench declared:

14. This distinction does not exist in Louisiana, *Sportono v. Fourichon*, 40 La. Ann. 424, 4 So. 71 (1888); Civil Code, Art. 2315, declares: "Every act whatever of man, that causes damage to another, obliges him, by whose fault it happens, to repair it." Hence, calling a white man a negro in that State is actionable. *Sportono v. Fourichon*, supra; but the words "dirty rat," "thief," and "swindler" applied by an irate and impulsive old woman, in an altercation with her landlord, are not actionable. *Mihojevich v. Bodechtel*, 48 La. Ann. 618, 19 So. 672 (1896).

15. Lord Herschell in *Alexander v. Jenkins* (1892), 1 Q. B. 797, 61 L. J. Q. B. 634. See articles by Van Vechten Veeder, 3 Col. L. R. 546, 4 Id. 33.

16. *Pollard v. Lyon*, 91 U. S. 225 (1875).

17. *Brooker v. Coffin*, 5 Johns. (N. Y.) 188 (1809); Spencer, J., said: "There is not, perhaps, so much uncertainty in the law upon any subject."

"There are divers cases in our law where one shall have *damnum absque injuria*; as for defamation in calling one a thief,¹⁸ or traitor; this is damage in our law, but no tort." Less than a century later, the Court of Common Pleas, in discussing an action brought because the defendant called the plaintiff a heretic,¹⁹ said: "But if it were matter wherein we could decide the main thing, as thief, traitor or the like, for such words an action would lie here, since we have cognizance of what is treason or felony."

The present rule in England is that "spoken words, which impute that the plaintiff has been guilty of a crime punishable with imprisonment, are actionable without proof of special damage."²⁰ In this country the prevailing rule is that words are actionable *per se* when the offense which they charge renders the party liable to an indictment for a crime involving moral turpitude, or subjecting him to infamous punishment.²¹ The rule has been variously modified, however, in different States. Some courts hold that words are actionable *per se* if they impute a criminal offense, whether indictable or not, if it is punishable corporally.²² Others,

18. *Browne v. Hawkins*, Y. B. 17 (1875); *Dudley v. Horne*, 21 Ala. Ed. IV, f. 3 pl. 2 (1477). 379 (1852); *Kinney v. Hosea*, 3

19. *Anonymous*, Y. B. 27 Hy. VIII, f. 14 pl. 4 (1535). The court assigned this reason for dismissing the action. "If the defendant should justify that the plaintiff is a heretic, and should show in what point, we could not discuss whether it was heresy or not." Harr. (Del.) 77 (1840); *Richardson v. Roberts*, 23 Ga. 215 (1856); *Halley v. Gregg*, 74 Ia. 563, 38 N. W. 416 (1888); *Lemons v. Wells*, 78 Ky. 117 (1879); *West v. Hanrahan*, 28 Minn. 385 (1881); *Hendrickson v. Sullivan*, 28 Neb. 329, 44 N. W. 448 (1889); *Johnson v. Shields*, 25 N. J. L. 116 (1855); *Brooker v. Coffin*, 5

20. *Webb v. Beavan*, 11 Q. B. D. 609, 52 L. J. Q. B. 544 (1883); *Johns. (N. Y.)* 188 (1809); *Davis v. Lopes, J.*, said: "A great number of offenses, which were dealt with by indictment twenty years ago, are now disposed of summarily, but the effect cannot be to alter the law with respect to actions for slander." *Marks v. Samuel* (1904), 2 K. B. 287, 73 L. J. K. B. 587, charging plaintiff with having brought a blackmailing suit is actionable. *Brown*, 27 Oh. St. 326 (1875); *Davis v. Sladden*, 17 Or. 259, 21 Pac. 140 (1889); *Davis v. Cary*, 141 Pa. 314, 21 At. 633 (1891); *Lodge v. O'Toole*, 20 R. I. 405, 39 At. 752 (1898); *Gage v. Shelton*, 3 Rich. L. (S. C.) 2:2 (1832). *Smith v. Smith*, 2 Sneed (34 Tenn.) 473 (1855); *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725 (1900).

21. *Pollard v. Lyon*, 91 U. S. 225 22. *Elliot v. Ailsbury*, 2 Bibb (Ky.)

if the crime imputed involves moral turpitude.²³ Still others, if the crime involves disgrace.²⁴ And yet others, if it subjects the offender to infamous punishment.²⁵

367. Whether an alleged offender is liable to an infamous punishment, depends upon the opinion, which the public entertains, of the character of the penalty imposable upon him. If the offense may be punished by confinement in a State prison or penitentiary at hard labor, the offender is subject to infamous punishment.²⁶ —

It is well settled that the imputation of a criminal offense need not be made with legal precision;²⁷ but it must convey the charge, that the one of whom it is spoken had done a wrong, which had been punished,²⁸ or was punishable, criminally.^{28a} If the statement, taken as a whole, disclosed the nature of the charge to be one of trespass, or dishonesty, or vice, the employment of such general terms as "thief," "swindler," "robbed," "stole," and the like, will not render the statement actionable.²⁹

473 (1811); *Buck v. Hersey*, 31 Me. Rob. 119 (1838); *Krebs v. Oliver*, 558 (1850); *Wagaman v. Byers*, 17 12 Gray (78 Mass.) 239 (1858); *Sipp Md.* 183 (1861); *Birch v. Benton*, v. Coleman, 179 Fed. 997 (1910), 26 Mo. 153 (1858).

23. *Frisbie v. Fowler*, 2 Conn. 706 (1818); *Redway v. Gray*, 31 Vt. 292 (1858); *Flaacke v. Stratford* (N. J.), 64 At. 146 (1906), whether defendant intended to charge a crime, involving moral turpitude was held to be a question for the jury.

28a. *Shockey v. McCauley*, 101 Md. 461, 61 At. 583 (1905).

29. *Murphy v. Olberding*, 107 Ia. 547, 78 N. W. 205 (1899). "You damn Irishman! You stole my wire," but the evidence showed that the wire was a part of the realty and not the subject of larceny.

24. *Miller v. Parish* 8, Pick. (25 Mass.) 383 (1829); *Zeliff v. Jennings*, 61 Tex. 458 (1884); *Geary v. Bennett*, 53 Wis. 444 (1881).

25. *Harris v. Terry*, 98 N. C. 131, 3 S. E. 745 (1887).

26. *Mackin v. United States*, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909 (1886).

27. *Odgers, Libel and Slander* (3d Ed.), p. 67, and cases cited. *Sherwood v. Chace*, 11 Wend. (N. Y.) 38 (1883); *Payne v. Tancil*, 98 Va. 262, 35 S. E. 725 (1900).

28. *Fowler v. Dowdney*, 2 Moo. & and a disgrace to the neighbor-

Nor is the charge of an intention to commit a specified crime actionable *per se*.³⁰

368. Imputing unchastity, even to women, was not actionable slander at common law,³¹ but has been made such by legislation in England³² and in many of our States.³³ In some jurisdictions, as we have seen, it has been made a criminal offense.^{33a} The Scotch courts, as well as those of several of our States, declined to accept the common law doctrine and declared such an imputation upon a woman actionable *per se*, because manifestly hindering her advancement in life.³⁴ These courts refuse to treat an imputation

hood;" *Savile v. Jardine*, 2 H. Bl. 531 (1795), "You are a swindler." Buller, J., said: "When a man is swindled, it means he is tricked or outwitted."

30. *Mitchell v. Sharon*, 59 Fed. 980, 8 C. C. A. 429 (1894); *Severinghaus v. Beckman*, 9 Ind. App. 388, 36 N. E. 930 (1893); *Fanning v. Chase*, 17 R. I. 388, 22 At. 275 (1891). If such a charge were written or printed, it would be actionable. *Browning v. Comm.*, 116 Ky. 282, 76 S. W. 19 (1903).

31. *Allsop v. Allsop*, 5 H. & N. 534, 29 L. J. Ex. 315 (1860); *Pollard v. Lyon*, 91 U. S. 225 (1875); *Ledlie v. Wallen*, 17 Mont. 150, 42 Pac. 289 (1895). See Civil Code of 1895, § 33, Sub. 4, changing the rule and making the imputation of unchastity to a man or a woman actionable.

32. Slander of Women Act, 1891 (54 & 55 Vict. c. 51).

33. *Preston v. Frey*, 91 Cal. 107, 27 Pac. 533 (1891); *Dexter v. Harrison*, 146 Ill. 169, 34 N. E. 46 (1893); *Campbell v. Irwin*, 146 Ind. 681, 45 N. E. 810 (1896) Ky. St. § 1, *Nicholson v. Merrit*, 109 Ky. 369, 59 S. W. 26 (1900); *Hemming v. Elliot*, 66

Md. 197, 7 At. 110 (1886); *Loranger v. Loranger*, 115 Mich. 681, 74 N. W. 228 (1898); *Christal v. Craig*, 80 Mo. 367 (1883); *Hemmens v. Nelson*, 138 N. Y. 517, 34 N. E. 342 (1893); *Bowden v. Bailes*, 101 N. C. 612, 8 S. E. 342 (1888); *Freeman v. Price*, 2 Bailey Law (S. C.) 115 (1831); *Hackett v. Brown*, 2 Heisk. (49 Tenn.) 264 (1871); *Stewart v. Major*, 17 Wash. 238, 49 Pac. 503 (1897).

33a. Alabama Criminal Code, § 7340; Texas Penal Code, Art. 1180; Missouri Rev. St. 1909, § 4817.

34. *Cushing v. Hederman*, 117 Ia. 637, 91 N. W. 940 (1902); *Reitan v. Goebel*, 33 Minn. 151, 22 N. W. 291 (1885); *Smith v. Minor*, 1 N. J. L. 16 (1790); *Barnett v. Ward*, 36 O. St. 107, 38 Am. R. 561 (1880). In *Nicholson v. Rust* (Ky.), 52 S. W. 933, the remarkable statement is made.—"In this State, and, so far as we are advised, throughout the U. S., it is actionable *per se* to impute a want of chastity to a female without allegation or proof of special damages, and it is not necessary that the words should make the charge in express terms."

of this sort as mere "brabbling words."³⁵ In their opinion, "as society is now constituted, a female against whom the want of chastity is established is driven beyond the reach of every courtesy and charity of life. Such a charge is more damaging in its effect than many which are most severely punished by our penal laws."^{35a}

369. Imputing Contagious Diseases. A false imputation of smallpox, or measles, or scarlet fever, or diphtheria, or the itch, is not actionable *per se*. "An action for oral slander," according to modern judicial authority,³⁶ "in charging the plaintiff with disease, has been confined to the imputation of such loathsome and infectious maladies as would make him an object of disgust and aversion, and banish him from human society. The only examples which adjudged cases furnish are of the plague,³⁷ leprosy,³⁸ and venereal diseases."³⁹

Moreover, if the words relate to time past, they are not actionable. Said a learned English judge:⁴⁰ "Charging a person with having committed a crime is actionable, because the person charged may still be punished; it affects him in his liberty."⁴¹ But charging another with having had a contagious disorder is not actionable; for unless the words spoken impute a continuance of the disorder

³⁵. Oxford v. Cross, 4 Coke, 18 Y.) 396 (1854); Kaucher v. Blinn, (1599); Hacker v. Heiney, 111 Wis. 29 Oh. St. 62 (1875).

313, 87 N. W. 249 (1901).

⁴⁰. Ashurst, J., in Carslake v.

^{35a}. Battles v. Tyson, 77 Neb. Mapledoran, 2 D. & E. 473 (1788) 563, 566, 110 N. 299 (1906).

Nichols v. Guy, 2 Ind. 82 (1850);

³⁶. Joannes v. Burt, 6 Allen (88 Pike v. Van Wormer, 5 How. Pr. (N. Mass.) 236 (1863).

Y.) 171 (1850); Irons v. Field, 9 R.

³⁷. Villers v. Monsley, 2 Wils. 403 I. 216 (1869), accord. (1769), dictum.

⁴¹. In Fowler v. Dowdney, 2 Moo.

³⁸. Taylor v. Perkins, Cro. Jac. & R. 119 (1838), it is said, that such 144 (1607); Meteye v. Times Pub. a charge is actionable, even though Co., 47 La. Ann. 824, 17 So. 315 the punishment is alleged to have (1895).

been suffered, because the "obloquy

³⁹. Austin v. White, Cro. Eliz. 214 remains." The obloquy attaching (1591); Bloodworth v. Gray, 7 M. to the victim of venereal disease & G. 334, 8 Scott, N. R. 9 (1844); seems to be disregarded by the Watson v. McCarthy, 2 Ga. 57 courts, when dealing with a charge (1847); Nichols v. Guy, 2 Ind. 82 as to time past; but it is taken into (1850); Golderman v. Stearns, 7 account when the charge relates to Gray (73 Mass.) 181 (1856); Wil- existing disorder; Lymbe v. Hock- liams v. Holdredge, 22 Barb. (N. ley, 1 Levinz 205 (1667).

at the time of speaking them, the gist of the action fails; for such a charge cannot produce the effect which makes it the subject of an action, namely, his being avoided by society. Therefore, unless some special damage is alleged in consequence of that kind of charge, the words are not actionable."

370. Imputation of Unfitness for Office. A false charge of any malversation, or misconduct in his office, is actionable in favor of the incumbent,⁴² whether the office be one of profit or of honor. Where, however, the imputation is that of unfitness for an office, a distinction is taken between offices of profit and those which are merely honorary.⁴³ With reference to the former, the law presumes a probability of loss to the incumbent from such defamatory statement.⁴⁴ With regard to the latter, it is held, that a charge of unfitness will not sustain an action, without proof of special damage, unless the alleged unfitness or personal misconduct be such as might cause him to be removed from, or deprived of, that office.⁴⁵

371. Words Which Prejudice a Person in His Profession or Trade. In order that these be actionable *per se*, it must appear that they were spoken of the plaintiff, in relation to a profession, trade, calling or business, in which he was then engaged.⁴⁶ Accord-

42. *Moor v. Foster*, Cro. Jac. 65 (1606); *Fleetwood v. Curley*, Cro. Jac. 557, Hob. 268 (1619); *Dole v. Van Rensselaer*, 1 Johns. Cas. (N. Y.) 330 (1800). See *Forward v. Adams*, 7 Wend. (N. Y.) 205, where the charge related to misconduct in an office from which the plaintiff had retired. Also, *Prosser v. Callis*, 117 Ind. 105, 19 N. E. 735 (1888).

43. In England, honorary officers include those of Sheriff, Justice of the Peace, Alderman, Town-Councillor, Vestrymen, and unbeneficed clergymen of the Church of England.

44. *Booth v. Arnold* (1895), 1 Q. B. 571, 67 L. J. Q. B. 443; *O'Shaughnessy v. N. Y. Record Co.*, 58 Fed. 653 (1893); *Gove v. Blethen*, 21 Minn. 80 (1874); *Cotulla v. Kerr*,

74 Tex. 89, 11 S. W. 1058 (1889); *Advertiser Co. v. Jones*, 169 Ala. 196, 53 So. 759 (1910), charging a city official with having sold city gravel for his own benefit; *Splering v. Andrae*, 45 Wis. 330 (1879), speaking of plaintiff as "a damned fool of a justice."

45. *Alexander v. Jenkins* (1892), 1 Q. B. 797, 61 L. J. Q. B. 634. The charge was that the plaintiff was "never sober, and not a fit man for the town council."

46. *Bellamy v. Burch*, 16 M. & W. 590 (1847). "Here the plaintiff was bound to prove that he exercised the so-called profession before and at the time the words were spoken. But the jury have found that the plaintiff's profession, so-called, did not continue at the time

ingly, a dry-goods merchant does not make out a cause of action, by showing that the defendant falsely asserted that the plaintiff "made false statements about and misrepresented the lot which he traded to me." Such words are not used of him "with respect to his employment" as merchant, but with respect to an outside transaction.⁴⁷ But the statement, "Our school-teacher is a villainous reptile. He is not fit to go with decent girls," is clearly aimed at its victim in his vocation; and is actionable *per se*.⁴⁸

The early English cases⁴⁹ show a disposition on the part of judges to limit the terms "profession" and "trade" rather narrowly, but the modern "rule,"⁵⁰ as to words spoken of a man in

the words were spoken; that excludes all presumption on the subject; the defendant's act was nothing more than speaking of the plaintiff as a former contractor."

47. *Winsette v. Hunt* (Ky.), 53 S. W. 522 (1899); *Todd v. Hastings*, 2 Saund. 307 (1671), "You are a cheating fellow, and keep a false book," without proof that the charge touched the plaintiff in his trade, held not to be actionable. *Newman v. Kingerby*, 2 Lev. 49 (1672), calling a parson a "fool, ass and goose," was held not actionable as "these are only words of heat, and do not touch him in his profession." *Lumby v. Allday*, 1 Cr. & Jer. 301, 1 Tyrw. 217 (1831). In *Dallavo v. Snider*, 141 Mich. 542, 107 N. W. 271 (1906), it is laid down as clear law, "that in a case where the charge is the uttering of slanderous words the allegations of the declaration must be sustained by proof that the words were actually spoken of and concerning the plaintiff in relation to his business, in order to make them slanderous *per se*."

48. *Bray v. Callihan*, 155 Mo. 43, 55 S. W. 865 (1900); *Nicholson v. Dillard*, 137 Ga. 225, 73 S. E. 832

(1911); *Birchley's Case*, 4 Coke, 16 a. (1585), charging an attorney with being corrupt in his profession; *Squire v. Johns*, Cro. Jac. 585 (1620), charging a dyer with being a bankrupt knave. *Southam v. Allen*, T. Ray, 231 (1673); *Trimmer v. Hiscock*, 27 Hun (N. Y.), 364 (1882), charging innkeeper with being bankrupt or having no decent accommodations; *Buck v. Hersey*, 31 Me. 558 (1850), charging a teacher of dancing with drunkenness, vagrancy, etc.

49. In *Terry v. Hooper*, T. Ray, 86 (1663), the court was evenly divided as to whether the plaintiff's business of lime-burning "were such a profession of which he may be scandalized." In *Fox v. Laphorne*, T. Jones, 156 (1681), it was held that a renter of lands was not a trader, so as to be "touched in his trade" by the charge that he had cheated in corn. In *Barker v. Ringrose*, Popham, 184 (1626), a wool-winder was held not to be scandalized by the charge that he was a bankrupt knave.

50. *Foulger v. Newcomb*, L. R. 2 Ex. 327, 36 L. R. Ex. 169 (1867); *DePew v. Robinson*, 95 Ind. 109

his office or trade, is not necessarily confined to offices and trades of the nature and duties of which the law can take notice. The only limitation is, that it does not apply to illegal callings."⁵¹ In the Missouri case cited in the last note, plaintiffs obtained a judgment of \$750 for a libelous publication in which they were called "miserable charlatans." Their business was that of magnetic healing, and evidence convinced the appellate court that the business as conducted by the plaintiffs was "a fraud and not entitled to protection under the law."

372. In cases of the sort now under consideration, the complaint should expressly allege that the defamatory statement was uttered of the plaintiff in the way of his then profession, trade, business or calling, unless this clearly appears from the statement itself.⁵²

Whether a particular statement is such as to necessarily harm its victim in his vocation is a question of fact.

It is not strange, therefore, that the verdict of jurors and the rulings of judges, with respect to very similar statements, are quite diverse. There can be no doubt, however, that to falsely charge a trader with insolvency,⁵³ or a professional man with moral unfitness⁵⁴ or mental incompetence⁵⁵ or want of ordinary skill in his

(1883); *Fitzgerald v. Redfield*, 51 Barb. (N. Y.) 484 (1868), that plaintiff, a stone mason, "was no mechanic; that he could not make a good wall; that he was a botch," was held actionable *per se*, and it was declared that "there is no distinction between a learned profession and a mechanical trade." *Cruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. 457 (1890); *Morasse v. Brochu*, 151 Mass. 567, 25 N. E. 74, 8 L. R. A. 524, 21 Am. St. R. 474 (1890); *Lovejoy v. Whitcomb*, 174 Mass. 586, 55 N. E. 322 (1899).

51. *Hunt v. Bell*, 1 Bing. 1 (1822), keeping open rooms for pugilistic encounters; *Weltmer v. Bishop*, 171 Mo. 110, 71 S. W. 167 (1902).

52. *Ayre v. Craven*, 2 Ad. & E. 2 (1834); *Jones v. Little*, 7 M. & W. 423, 10 L. J. Ex. 171 (1841).

53. *Whittington v. Gladwin*, 5 B. & C. 180, 2 C. & P. 146 (1826); *Newell v. How*, 31 Minn. 235, 17 N. W. 383 (1883); *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 22 S. W. 358, 20 L. R. A. 138, 38 Am. St. R. 592 (1893).

54. *Pemberton v. Colls*, 10 Q. B. 461, 16 L. J. Q. B. 403 (1847); *Irwin v. Brandwood*, 2 H. & C. 960, 33 L. J. Ex. 257 (1864); *Piper v. Woolman*, 43 Neb. 280, 61 N. W. 588 (1895); *Hayner v. Cowden*, 27 Oh. St. 292 (1875).

55. *Peard v. Jones*, Cro. Car. 382 (1635); *Watson v. Vanderlash*, Hetl. 69, 71 (1628); *Botterill v. Whytehead*, 41 L. T. 588, 21 A. L. J. 103 (1879); *Dennis v. Johnson*, 42 Minn. 301, 44 N. W. 68 (1890); *St. James Military Acad. v. Gaiser*, 125 Mo. 517, 28 S. W. 851, 46 Am. S. R. 502 (1899); *Krug v. Pitass*, 162 N. Y.

calling,⁵⁶ or any person with dishonesty in the business whereby he gains his bread,⁵⁷ is to utter actionable slander.

373. Words Not Actionable Per Se, but Causing Special Damage. When defamatory language of this kind is the subject of complaint, the plaintiff must set forth the special loss or injury which he claims to have suffered, and must show that such injury is the natural and proximate consequence of the defamation.⁵⁸ It is not enough to allege generally that the plaintiff "has been damaged and injured, in her name and fame,"⁵⁹ nor that he has "suffered pain of mind, lost the society or good opinion of his neighbors, or the like, unless he has also been injured in his estate or property."⁶⁰ It is enough, however, to allege and prove that the slander has prevented the plaintiff from obtaining civil entertainment at a public house,⁶¹ or has led to her being turned away from a private house, where she was receiving gratuitous entertainment,⁶² or

154, 56 N. E. 526, 76 Am. S. R. 317 Y.) 309 (1842); *Terwilliger v. Wands*, 17 N. Y. 54 (1858); *Bassell*

^{56.} *Day v. Buller*, 3 Wils. 59 (1770); *Edsall v. Russell*, 4 M. & Gr. 1090, 5 Scott, N. R. 801, 2 Dowl. N. S. 641, 12 L. J. C. P. 4 (1843); *Johnson v. Robertson*, 8 Port. (Al.) 486 (1839); *Sumner v. Utley*, 7 Conn. 257 (1828); *Secor v. Harris*, 18 Barb. (N. Y.) 425 (1854); *Mattice v. Willcox*, 147 N. Y. 624, 42 N. E. 270 (1895); *Ganorean v. Superior Pub. Co.*, 62 Wis. 403, 22 N. W. 726 (1885).

^{57.} *Thomas v. Jackson*, 3 Bing. 104, 10 Moore, 425 (1825); *Garr v. Selden*, 6 Barb. (N. Y.) 416 (1848); *Fowles v. Bowen*, 30 N. Y. 20 (1864).

^{58.} *Haddon v. Lott*, 15 C. B. 411, 24 L. J. C. P. 49 (1860). See *Remoteness of Damage*, *supra*.

^{59.} *Pollard v. Lyon*, 91 U. S. 225 (1875); *Cook v. Cook*, 100 Mass. 194 (1868).

^{60.} *Beach v. Ranney*, 2 Hill (N.

v. Elmore, 65 Barb. (N. Y.) 627 (1866), 48 N. Y. 561 (1872); *Reporters' Assoc. of Amer. v. Sun Printing & Pub. Assoc.*, 186 N. Y. 437, 442, 79 N. E. 710 (1906), special damages must be stated with particularity in order that the defendant may be enabled to meet the charge." *Velikanje v. Millichamp*, — Wash. —, 120 Pac. 876 (1912).

^{61.} *Olmsted v. Miller*, 1 Wend. (N. Y.) 506 (1828). In *Roberts v. Roberts*, 5 B. & S. 384, 33 L. J. Q. B. 249 (1864), it was held that the loss, suffered by the plaintiff in being excluded from a religious society, was not temporal damage. *Dwyer v. Meehan*, 18 L. R. Ir. 138 (1886), accord.

^{62.} *Davies v. Solomon*, L. R. 7 Q. B. 112, 41 L. J. Q. B. 10 (1871); *Williams v. Hill*, 19 Wend. (N. Y.) 305 (1838).

has caused the retraction of a pecuniarily valuable, though gratuitous promise,⁶³ or has caused a woman the loss of a marriage,⁶⁴ or has prevented a person from getting or keeping employment,⁶⁵ or has caused an injury to the plaintiff's business or avocation.⁶⁶ Such loss, however, must be shown to have been the natural and probable consequence of the defamatory statement.⁶⁷

Whether the defamatory language is actionable *per se* is a question for the court, unless it is of such character that an innuendo is needed to bring out the latent injurious meaning; when it must be left to the jury to say whether the language was understood in the defamatory sense set forth in the innuendo.^{67a}

374. General Damages in Defamation. These may be either nominal, compensatory or exemplary.⁶⁸ The amount of damages in each case is peculiarly a question for the jury;⁶⁹ but the courts do not hesitate to set aside or modify verdicts, which are either so excessive, or so meager, as to indicate improper motives in the jury.⁷⁰

63. *Corcoran v. Corcoran*, 7 Ir. C. L. R. 272 (1857), promise to supply plaintiff with means for a trip to Australia.

64. *Davis v. Gardiner*, 4 Coke, 16b (1593); *Sheppard v. Wakeman*, 1 Lev. 53 (1662).

65. *Sterry v. Foreman*, 2 C. & P. 592 (1827).

66. *Brown v. Smith*, 13 C. B. 596, 22 L. J. C. P. 151 (1853).

67. *Miller v. David*, L. R. 9 C. P. 118, 43 L. J. C. P. 84 (1874). There is "no authority for the proposition that a statement, false and malicious, made by one person in regard to another whereby that other might probably, under some circumstances, and at the hands of some persons, suffer damage, would, if damage resulted in fact, support an action for defamation." *Terwilliger v. Wands*, 17 N. Y. 34 (1858);

Shafer v. Anhalt, 48 Md. 171, 173, 30 Am. R. 456 (1877); "It cannot be said that sickness is the natural consequence of slanderous words. Such might or might not be the result, depending in a great measure upon the sensibilities and temperament of the person."

67a. *Velikange v. Millichamp*, — Wash. —, 120 Pac. 876 (1912); *Odgeas on Libel & Slander* (5th Ed.), 116.

68. *Supra*, Ch. V, § 3. Mental suffering as an element of damages, *supra*, Chap. III, § 11.

69. *Holmes v. Jones*, 147 N. Y. 59, 41 N. E. 409 (1896); *Minter v. Bradstreet Co.*, 174 Mo. 444, 73 S. W. 668 (1903).

70. *Peterson v. W. U. Tel. Co.*, 65 Minn. 18, 67 N. W. 646 (1896); *Sedgwick on Damages* (9th Ed.), ch. 58.

It is to be borne in mind, that while malice in fact, as distinguished from malice in law, must be shown in order to sustain a verdict for exemplary damages,⁷¹ it is not necessary to establish the existence of actual malevolence on the defendant's part towards the plaintiff.⁷² It is enough to show that the defendant's conduct in publishing the defamation,⁷³ or in pleading its truth as a defense,⁷⁴ was reckless or wanton. Evidence of such misconduct is always competent for the plaintiff in aggravation of his damages; as is evidence of the extent, to which the defendant has published the defamation; of the number of his repetitions of it, or of his refusal to retract, or of the nature of his apology.⁷⁵

On the other hand, the defendant may absolve himself from exemplary damages or mitigate them, by showing that he acted in good faith, in repeating the defamatory statement as a matter of hearsay, and giving the source of his information,⁷⁶ or by showing that the plaintiff provoked the statement,⁷⁷ or by showing the plaintiff's bad reputation.⁷⁸ By statute in some jurisdictions, various matters may be shown in mitigation of damages, which were not

71. *Peterson v. W. U. Tel. Co.*, 72 Minn. 41, 74 N. W. 1022 (1898). See *Gribble v. Pioneer Press Co.*, 34 Minn. 342, 25 N. W. 710 (1885); *Minter v. Bradstreet Co.*, 174 Mo. 444, 73 S. W. 668 (1903), malice in law is defined as a wrongful act, done intentionally without legal justification or excuse, while malice in fact is defined as an act done with intent to harm the plaintiff or with a wilful and wanton neglect of his rights. *Lee v. Crump*, 146 Ala. 655, 40 So. 609 (1906).

72. *Smith v. Matthews*, 152 N. Y. 152, 46 N. E. 164 (1897).

73. *Warner v. Press Pub. Co.*, 133 N. Y. 181, 30 N. E. 393 (1892); *Morning Journal Assoc. v. Rutherford*, 51 Fed. 513, 2 C. C. A. 354, 1 U. S. App. 296 (1892).

74. *Marx v. Press Pub. Co.*, 134 N. Y. 561, 31 N. E. 918 (1892).

75. *Chamberlin v. Vance*, 51 Cal. 75 (1875); *Thibault v. Sessions*, 101

Mich. 279, 59 N. W. 674 (1894); *Enos v. Enos*, 135 N. Y. 609, 32 N. E. 123 (1892); *Van Derveer v. Sutphin*, 5 Oh. St. 293 (1855); *Patten v. Belo*, 79 Tex. 41, 14 S. W. 1037 (1890).

76. *Duncombe v. Daniel*, 8 C. & P. 222, 2 Jur. 32 (1837); *Dole v. Lyon*, 10 Johns. (N. Y.) 447 (1813); *Republican Pub. Co. v. Mosman*, 15 Col. 399, 24 Pac. 1051 (1900); *Lothrop v. Adams*, 133 Mass. 471 (1882); *Upton v. Hume*, 24 Or. 420, 33 Pac. 810 (1893).

77. *Tarpley v. Blabey*, 2 Bing. N. C. 247, 2 Scott, 642, 7 C. & P. 367 (1836); *Stewart v. Tribune Co.*, 41 Minn. 71, 42 N. W. 787 (1889).

78. *Scott v. Sampson*, 8 Q. B. D. 491, 51 L. J. Q. B. 380 (1882); *Halley v. Gregg*, 82 Ia. 622, 48 N. W. 974 (1891).

available at common law.⁷⁹ Absence of actual malice does not exempt the defamer from liability at common law to compensatory damages⁸⁰ except in the cases of qualified privilege, to be considered presently; nor does the fact that the defamation had been published by others, nor that the plaintiff had recovered against such others,⁸¹ in the absence of a statute changing the common law.^{81a} Compensatory damages include loss of reputation, shame and injury to the feelings.⁸²

375. Differences Between Libel and Slander. The rules stated in the last preceding paragraph apply equally to both forms of defamation. This is not true, however, of many of the rules heretofore stated, as has been pointed out in this and the preceding section. Undoubtedly spoken words of defamation, which necessarily tend to injure one in his business, are as actionable as the same words would be if printed.^{82a} But language which merely ridicules a person, or holds him up to contempt with a part only of the public, will be actionable if in printed form,^{82b} when it would not be if uttered orally.^{82c} In some jurisdictions the truth of the

79. Lord Campbell's Act, 6 & 7 Vict. c. 96; New York Code of Civil Procedure, §§ 535, 536; North Dak. Code of Civ. Proc., §§ 6874, 6875; Ohio Gen. Code, §§ 11,341-11,343.

80. Odgers, *Libel & Slander* (3d Ed.), p. 362. But see Ohio Gen. Code, § 11,343, and similar statutes.

81. *Creevy v. Carr*, 7 C. & P. 64 (1835); *Enquirer Co. v. Johnston*, 72 Fed. 443, 18 C. C. A. 628 (1896); *Wilson v. Fitch*, 41 Cal. 363 (1873); *Sheahan v. Collins*, 20 Ill. 325 (1858); *Palmer v. Matthews*, 162 N. Y. 100, 56 N. E. 501 (1900); *Conroy v. Pittsburg Times Co.*, 139 Pa. 334, 21 At. 154 (1891).

81a. Laws of Maine, 1911, ch. 123: "At the trial of any action for libel, the defendant shall be at liberty to give evidence in mitigation of damages that the plaintiff has already recovered or has brought action for damages for, or has received or has

agreed to receive compensation for substantially the same libel as that for which said action was brought."

82. *Hearne v. De Young*, 132 Cal. 357, 64 Pac. 576 (1901); *Bedtkey v. Bedtkey*, 15 S. D. 310, 89 N. W. 479 (1902); *Hacker v. Heiney*, 111 Wis. 313, 87 N. W. 249 (1901).

82a. *Gross Coal Co. v. Rose*, 126 Wis. 24, 105 N. W. 225 (1905).

82b. *Peck v. Tribune Co.*, 214 U. S. 185, 29 Sup. Ct. 554 (1909).

82c. *Peck v. Tribune Co.*, 154 Fed. 330, 83 C. C. A. 202 (1907), reversed by Sup. Court, as shown in preceding note. This opinion seems to have been written with the thought that the case was one of slander rather than of libel; *D'Altomonte v. New York Herald*, 154 App. Div. 453, 139 N. Y. Supp. 200 (1913); *Holland v. Flick*, 212 Pa. 201, 61 At. 282 (1905).

defamatory charge is a perfect defense to an action for slander though it may not be to one of libel.^{82d}

§ 4. DEFENSES IN ACTIONS FOR DEFAMATION.

376. Classified. These may be classed under three heads: Truth, Privilege, and Fair Comment.

377. The truth of the charge is a complete defense at common law to a civil action for slander or libel, because "the law will not permit a man to recover damages in respect to an injury to a character which he either does not or ought not to possess."⁸³ It must be specially pleaded, however, in order that evidence of it may be given; for this defense is "not a direct denial of the cause of action, but a collateral matter, which, if established by the defendant, will bar a recovery that otherwise must follow the malicious injury."⁸⁴ Moreover, the justification must be as broad as the defamatory charge, and the defendant has the burden of showing that every material part of the charge is true.⁸⁵ Even though particular statements are true, they may be so interwoven with falsehood as to produce the effect of fabrication.^{85a} Again, a plea of the truth should state the charge with the precision of an

^{82d}. *Larson v. Cox*, 68 Neb. 44, 93 N. W. 1011 (1903). But see *Razee v. State*, 73 Neb. 732, 103 N. W. 438 (1905).

⁸³. *McPherson v. Daniels*, 10 B. & C. 270, 5 M. & R. 251, 34 R. R. 397 (1829); *Baum v. Clause*, 5 Hill (N. Y.) 199 (1843); *McCloskey v. Pulitzer Pub. Co.*, 152 Mo. 339, 53 S. W. 1087 (1899); *Castle v. Houston*, 19 Kan. 417 (1877); *Courier-Journal Co. v. Phillips*, 142 Ky. 373, 134 S. W. 446 (1911).

⁸⁴. *Atwater v. Morning News Co.*, 67 Conn. 504, 34 At. 865 (1896); *Pokrok Pub. Co. v. Zizkovsky*, 42 Neb. 64, 60 N. W. 358 (1894); *McCloskey v. Pulitzer Pub. Co.*, 152 Mo. 339, 53 S. W. 1087 (1899).

⁸⁵. *Davis v. Priddle*, 216 Ill. 553, 75 N. E. 243 (1905); *Miller v. McDonald*, 139 Ind. 465, 39 N. E. 159 (1894); *Murphy v. Olberding*, 107 Ia. 547, 78 N. W. 205 (1899); *Rutherford v. Paddock*, 180 Mass. 289, 62 N. E. 381 (1902); proof of plaintiff's unchastity is insufficient to establish truth of charge that she was a "dirty, old whore;" *Thompson v. Pioneer Press Co.*, 37 Minn. 285, 33 N. W. 856 (1887); *Andrews v. Van Duzer*, 11 Johns. (N. Y.) 38 (1814); *Dement v. Houston Printing Co.*, 14 Tex. Civil App. 391, 37 S. W. 985 (1896); *Dillard v. Collins*, 25 Gratt (Va.) 343 (1874).

^{85a}. *Hubbard v. Allyn*, 200 Mass. 166, 86 N. E. 356 (1908).

indictment,⁸⁶ and will be construed strictly against the defendant.⁸⁷ In some States the truth of a libel is not a defense, unless the publication was made in such circumstances as to convince the jury that the defendant acted with good motives and for justifiable ends.⁸⁸ Constitutional or statutory provisions to this effect are more frequent, however, with respect to criminal libel.⁸⁹ In New Hampshire this doctrine prevails, even in the absence of constitutional and statutory provisions.^{89a}

378. Privileged Communications. These are of two kinds—absolutely privileged and conditionally privileged. From considerations of public policy, which have been presented in a previous chapter,⁹⁰ certain persons are privileged to defame others with impunity. But this class is small.^{90a} (1) Members of Parliament in England, and Members of Congress and of the State Legislatures in this country, are not to be questioned in any other place for any speech or debate.⁹¹ This exemption does not extend to the members

86. *Hickinbotham v. Leach*, 10 M. & W. 363, 2 Dowl. N. S. 270 (1892); *Dennis v. Johnson*, 47 Minn. 56, 49 N. W. 383 (1891); *Woodbeck v. Keller*, 6 Cow. (N. Y.) 118 (1826); *Bodine v. Times-Journal Pub. Co.*, 26 Okla. 135, 110 Pac. 1096 (1910).

87. *Sunman v. Brewin*, 52 Ind. 140 (1875); *Buckner v. Spaulding*, 127 Ind. 229, 26 N. E. 792 (1890); *Smith v. Buchecker*, 4 Rawle (Pa.) 295 (1833); *Skinner v. Grant*, 12 Vt. 456 (1840); *Leyman v. Latimer*, 3 Ex. Div. 15, 352, 46 L. J. Ex. 465, 47 L. J. Ex. 470 (1878).

88. *Neillson v. Jensen*, 56 Neb. 430, 76 N. W. 866 (1898), applying Art. 1, Sec. 5 of the State Constitution: "The framers of the constitution may have been of opinion that the peace, good order and well being of the state would be best subserved, if every citizen devoted, at least a part of his time to attending to his own business, instead of constituting himself an agent for bruiting abroad the shortcomings of his neighbor." This case seems to be overruled in *Razer v. State*, 73 Neb. 732, 103 N. W. 438 (1905); *Perry v. Porter*, 124 Mass. 338 (1878), applying the statute of that state; *Ross v. Ward*, 14 S. D. 240, 85 N. W. 182 (1901), applying Art. 6, Sec. 5 of State Constitution; *Cardarelli v. Providence Jour. Co.*, 33 R. I. 268, 80 At. 583 (1911), applying Art. 1, § 20 of the State Constitution.

89. New York Constitution, Art. 1, Sec. 8; Lord Campbell's Act, (6 & 7 Vict. c. 96).

89a. *State v. Burnham*, 9 N. H. 34, 31 Am. Dec. 217 (1837); *Hutchins v. Page*, 75 N. H. 215, 72 At. 689 (1909).

90. *Supra*, Chap. III.

90a. *Hassett v. Carroll*, 85 Conn. 23, 35, 81 At. 1013 (1911), "practically limited to legislative and judicial proceedings and acts of State."

91. Bill of Rights, 1 Wm. & M., Sess. 2, c. 2; U. S. Constitution, Article 1, section 6, and similar clauses in the State Constitutions.

of subordinate assemblies, such as town or county councillors in England,⁹² or Boards of Aldermen or Supervisors in this country.⁹³ Their privilege to defame others is, at most, conditional. Nor does the absolute privilege of legislators attend them, outside of legislative proceedings, in which they are taking an official part.⁹⁴ Nor does it permit the circulation of defamatory speeches, even in connection with official publication of legislative proceedings,⁹⁵ in the absence of statutory provision.⁹⁶

The heads of executive departments are absolutely privileged for defamatory statements made by them, while acting within the limits of their authority. Their motives "are not to become the subject of inquiry in a civil suit for damages."^{96a}

378a. (2) Judicial officers,⁹⁷ counsel engaged in the conduct of proceedings before a court of competent jurisdiction,⁹⁸ whether a civil, military or naval court, parties to such litigations,⁹⁹ wit-

⁹². *Royal Aquarium Society v. App.* D. C. 167, 5 L. R. A. N. S. Parkinson (1892), 1 Q. B. 431, 61 163 (1904). See *Absolute Immunity* L. J. Q. B. 409.

⁹³. *Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020 (1899); *McGaw v. Hamilton*, 184 Pa. 108, 39 At. 4 (1898); *Buckstaff v. Hicks*, 94 Wis. 34, 68 N. W. 403 (1896).

⁹⁴. *Coffin v. Coffin*, 4 Mass. 1, 3 Am. Dec. 189 (1828).

⁹⁵. *Stockdale v. Hansard*, 2 Moo. & Rob. 9, 7 C. & P. 731, 9 A. & E. 1, 2 P. & D. 1, 8 Dowl. 148 522 (1839); *Trebby v. Transcript Pub. Co.*, 74 Minn. 84, 76 N. W. 961, 73 Am. St. R. 330 (1898).

⁹⁶. *Stockdale v. Hansard*, 11 A. & E. 253, 297, 8 Dowl. 522 (1840), which led to 3 and 4 Vict. ch. 9 (1843), and 51 and 52 Vict. ch. 64, § 4 (1888); *Mangena v. Wright* (1909), 2 K. B. 958, 78 L. J. K. B. 879, 100 L. T. 960; *Folkard's Law of Slander and Libel*, ch. 8.

^{96a}. *Spalding v. Villas*, 161 U. S. 483, 16 Sup. Ct. 631, 40 L. Ed. 780 (1896); *De Arnaud v. Ainsworth*, 24

in Defamation by Van Vechten
⁹⁷. *Scott v. Stanfield*, L. R. 3 Ex. 220, 37 L. J. Ex. 155 (1868); *Jekyll v. Sir John Moore*, 2 B. & P. N. R. 341, 6 Esp. 63 (1806); *Yates v. Lansing*, 5 Johns. (N. Y.) 282 (1810).

⁹⁸. *Munster v. Lamb*, 11 Q. B. D. 588, 52 L. J. Q. B. 726 (1883); *Mac-kay v. Ford*, 5 H. & N. 792, 29 L. J. Ex. 404 (1860), att'y in a county court. In *Higginson v. Flaherty*, 4 Ir. C. L. 125 (1854), a proctor in an ecclesiastical court was held not privileged in making statements irrelevant to the cause, reflecting on the integrity of the court. For rule as to proceedings before military and naval courts, see *Dawkins v. Lord Rockeby*, L. R. 7 H. L. 744, 45 L. J. Q. B. 8 (1875); *Barratt v. Kearns* (1905), 1 K. B. 504, 74 L. J. K. B. 318.

⁹⁹. *Hodgson v. Scarlett*, 1 B. &

nesses,¹⁰⁰ and jurors,¹ enjoy in England an absolute privilege from liability to a tort action for defaming others, while engaged in the discharge of their functions. In this country the rule is not so broad, except in a few States,^{1a} in the case of counsel, witnesses and parties. Thus defamatory statements are absolutely privileged, only when they are pertinent and material to the controversy.² It has been judicially declared that "the doctrine which prevails abroad has not commended itself to the judiciary of this country, and it has been qualified so that statements, verbal or written,

Ald. 244 (1818); *Bottomley v. Brougham* (1908), 1 K. B. 584, 77 L. J. K. B. 311; pleading absolutely privilege.

100. *Seaman v Netherclift*, 2 C. P. D. 53, 46 L. J. C. P. 128 (1876); *Keightley v. Bell*, 4 F. & F. 463 (1866). With the possibility of an action for slander hanging over his head, "a witness cannot be expected to speak with that free and open mind, which the administration of justice demands," said Lord Penzance in *Dawkins v. Rockeby*, L. R. 7 H. L. 744 (1875); *Watson v. McEwan* (1905), A. C. 480, 74 L. J. P. C. 151, 93 L. T. 489.

1. *Reg. v. Skinner*, Loft. 55 (1772); *Little v. Pomeroy*, Ir. R. 7 C. L. 50.

1a. *Sebree v. Thompson*, 126 Ky. 223, 103 S. W. 223; *Yancey v. Comm.*, 135 Ky. 207, 122 S. W. 123 (1909).

2. *White v. Nichols*, 3 How. (U. S.) 266 (1845); *Union Mut. Life Ins. Co. v. Thomas*, 83 Fed. 803, 28 C. C. A. 96 (1897); allegation in a pleading; *Lawson v. Hicks*, 38 Al. 279 (1862); *Chambliss v. Blau*, 127 Ala. 86, 28 So. 602 (1900); *Wyatt v. Buell*, 47 Cal. 624 (1874); *People v. Green*, 9 Col. 506 (1886); *Lester v. Thurmond*, 51 Ga. 118 (1874); *Comfort*

v. Young, 100 Ia. 627, 69 N. W. 1032 (1897); *McDavitt v. Boyer*, 169 Ill. 475, 48 N. E. 317 (1897); *Gardemal v. McWilliams*, 43 La. Ann. 454, 9 So. 108, 28 Am. S. R. 197 (1891); *Hunckel v. Vonieff*, 69 Md. 179, 14 At. 500 (1888); *Maulsby v. Reifsnider*, 69 Md. 143, 14 At. 505 (1888); *Hoar v. Woods*, 3 Met. (44 Mass.) 193 (1841); *McAllister v. Press Co.*, 76 Mich. 338, 43 N. W. 431, 15 Am. S. R. 318 (1889); *Hartung v. Shaw*, 130 Mich. 177, 89 N. W. 701 (1902); *Hastings v. Lusk*, 22 Wend. (N. Y.) 410, 34 Am. Dec. 330, and note (1839); *Gilbert v. People*, 1 Den. 41, 43 Am. Dec. 646, and note (1841); *Moore v. Manufacturers' Bank*, 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753 (1890); *Gattis v. Kilgo*, 128 N. C. 402, 38 S. E. 931 (1901); *Shadden v. McElwee*, 86 Tenn. 146, 152, 5 S. W. 604, 6 Am. S. R. 821 (1887); *Cooley v. Galyon*, 109 Tenn. 1, 70 S. W. 607, 60 L. R. A. 139, 97 Am. St. R. 823 (1902); *Crockett v. McLanahan*, 109 Tenn. 517, 72 S. W. 950 (1903); *Torrey v. Field*, 10 Vt. 353 (1838); *Clemmons v. Danforth*, 67 Vt. 617, 32 At. 626 (1895); *Johnson v. Brown*, 13 W. Va. 71 (1878); *Calkins v. Sumner*, 13 Wis. 193 (1860).

made in the course of judicial proceedings, must at least be pertinent and material to the case, to be privileged.”^{2a}

This “qualification of the English rule is adopted in order that the protection given to individuals, in the interest of an efficient administration of justice, may not be abused as a cloak from beneath which to gratify private malice.”³ But, as another learned judge has remarked,⁴ the courts are liberal in applying this qualification “even to the extent of declaring that where matter is put forth by counsel, in the course of a judicial proceeding, that may possibly be pertinent, they will not so regard it as to deprive its author of his privilege.”

In Louisiana the qualified character of the privilege accorded to counsel, and parties and witnesses in judicial proceedings, has been attributed in part to a provision of the Civil Code which declares that “Every act whatever of man that causes injury to another obliges him by whose fault it happened to repair it.”^{4a}

379. Functions of the Court and of the Jury. Whether an allegation in a pleading, or a statement by counsel, parties or witnesses, is pertinent to the cause, is usually a question for the court.⁵ Whether the person making the statement acted in good faith in making it, is a question of fact for the jury.⁶

380. Condition or Qualified Privilege. In cases of absolute privilege, as we have seen, neither the falsity of the defamatory

^{2a.} *Carpenter v. Grimes* P. P. M. *Dunn v. Southern Ins. Co.*, 116 La. Co., 19 Idaho 384, 114 Pac. 42 431, 40 So. 786 (1906).

(1911), quoting from *Sherwood v. Powell*, 61 Minn. 479, 63 N. W. 1103, 29 L. R. A. 153, 52 Am. St. R. 614 (1895). Accord, *Flynn v. Boglarsky*, 164 Mich. 513, 129 N. W. 674 (1911); *Baggett v. Grady*, 154 N. C. 342, 70 S. E. 618 (1911).

^{3.} Lord, J., in *McLaughlin v. Cowley*, 127 Mass. 316 (1879). Accord, *Sheppard v. Bryant*, 191 Mass. 591, 594, 78 N. E. 394 (1906).

^{4.} Vann, J., in *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265 (1897).

^{4a.} *Lescalle v. Joseph Schwarz Co.*, 116 La. 293, 40 So. 708 (1905), 118 La. 718, 43 So. 385 (1907). Cf.

^{5.} *Jones v. Brownlee*, 161 Mo. 258, 61 S. W. 795, 53 L. R. A. 448 (1901), citing *Johnson v. Brown*, 13 W. Va. 71 (1878); *Forbes v. Johnson*, 11 B. Mon. (50 Ky.) 48 (1850); *Strauss v. Meyer*, 48 Ill. 385 (1868); *Garr v. Selden*, 4 N. Y. 91 (1850); *Bohlinger v. Germania L. I. Co.*, — Ark. —, 140 S. W. 257 (1911); *Williams Printing v. Saunders*, — Va. —, 73 S. E. 472 (1912).

^{6.} *Klinck v. Colby*, 46 N. Y. 427 (1871); *Marsh v. Ellsworth*, 50 N. Y. 309 (1872); *Hassett v. Carroll*, 85 Conn. 23, 81 At. 1013 (1911).

statement, nor the bad faith of the defamer, is a subject of inquiry. Granting that the defendant knew his statement was absolutely false, and that he took advantage of his position from the meanest of motives, he still goes scot free.

Where the false, defamatory statement is only conditionally privileged, however, the good or bad faith of the defendant is a very material matter of inquiry. Accordingly, in this country, when counsel, parties or witnesses indulge in false and defamatory statements, which are not material or pertinent to the questions involved in the judicial proceeding in which they are made, the victim may maintain a civil action therefor, by showing that the defendant made the statement in bad faith. In such a case, the question at issue is one of "conduct, of motive, of good faith and honest purpose, or of bad faith and malicious purpose."⁷ The plaintiff must allege that the statement was not only false and malicious, but that it was not pertinent, and that it was made in bad faith.⁸ And the burden of proof is upon him to establish these allegations.⁹

381. Good Faith Presumed. In cases of conditional privilege, it will be observed, the law presumes the defamatory statement to have been made in good faith and for an honest purpose; but such presumption is not conclusive, and the victim is at liberty to establish, if he can, bad faith and malicious purpose on the part of his defamer.¹⁰

This presumption of good faith is based upon the nature of the occasion. When a person makes a defamatory statement, "in the discharge of some public or private duty, whether legal or moral,

7. *White v. Carrol*, 42 N. Y. 161 (1870).

8. *Hartung v. Shaw*, 130 Mich. 177, 89 N. W. 701 (1902); *Mower v. Watson*, 11 Vt. 536, 34 Am. Dec. 704 (1839); *Johnson v. Brown*, 13 W. Va. 71 (1878); *Gosewich v. Doran*, 161 Cal. 511, 119 Pac. 656 (1911).

9. *Richardson v. Gunby*, — Kan. —, 127 Pac. 533 (1912); *McDavitt v. Boyer*, 169 Ill. 475, 48 N. E. 317 (1897); *Cranfill v. Hayden*, 97 Tex. 544, 80 S. W. 609 (1904).

10. Cases in last two notes. *Henry v. Moberly*, 6 Ind. App. 490, 33 N. E. 981, 48 A. L. J. 34 (1893); *Strode v. Clement*, 90 Va. 553, 19 S. E. 177 (1894); *Hubbard v. Allyn*, 200 Mass. 166, 86 N. E. 356 (1908). "Where an alleged libel is based on a misstatement of fact, plaintiff is not required to prove actual malice:" *Melcher v. Beeler*, 48 Colo. 233, 110 Pac. 181 (1910); *Tanner v. Stevenson*, 138 Ky. 578, 128 S. W. 878 (1910).

or in the conduct of his affairs, in matters where his interest is concerned," the occasion is privileged. It "prevents the inference of malice which the law draws from unauthorized communications. If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them, within any narrow limits."¹¹

In order that the occasion be privileged, the duty or interest described above must exist. No amount of good faith in believing that it existed will avail the defendant.¹² "Whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact in dispute upon which the question depends, they must be left to the jury."^{12a} But when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion."¹³ If the occasion is privileged, it matters not whether the privilege is based upon a duty or an interest of the defendant, he is entitled to the presumption that he acted in good faith. "The privilege would be worth very little if a person making a communication on a privileged occasion, were to be required in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true * * * No distinction can be drawn between one class of privileged communications and another."¹⁴

382. Defamation in the Performance of a Duty. It is not necessary that the duty be one of positive legal obligation, enforceable by "indictment, action or mandamus; it may be only a moral or social duty of imperfect obligation."¹⁵ When the statement is

11. *Toogood v. Spyring*, 1 C. M. & 341, 60 L. J. Q. B. 577; *Fields v. R.* 181, 4 Tyr. 582 (1834); *Lewis v. Bynum*, 156 N. C. 413, 72 S. E. 449 *Daily News Co.*, 81 Md. 473, 32 At. (1911).

246, 29 L. R. A. 59 (1895); *Marks v. Baker*, 28 Minn. 162, 9 N. W. 678 App. 89, 70 S. E. 686 (1911).

(1881); *Finley v. Steele*, 159 Mo. 299, 60 S. W. 108 (1900); *Klinck v. Colby*, 46 N. Y. 427 (1871); *Briggs v. Garrett*, 111 Pa. 404, 2 At. 513 (1886).

12a. *Whitley v. Newman*, 9 Ga. App. 89, 70 S. E. 686 (1911). 13. *Hebditch v. McIlwaine* (1894), 2 Q. B. 54, 63 L. J. Q. B. 587. 14. *Jenoure v. Delmege* (1891), A. C. 73, L. J. P. C. 11.

15. *Harrison v. Bush*, 5 E. & B.

12. *Stuart v. Bell* (1891), 2 Q. B. 344, 25 L. J. Q. B. 25, 99 (1855);

made in the performance of a duty clearly imposed by a rule of law, courts are everywhere agreed that the occasion is a privileged one.¹⁶ When, however, the duty is one of a social or moral nature, the question, whether it renders the occasion privileged, is one upon which judicial opinion is most discordant.¹⁷

This is not surprising, because, as a learned judge has pointed out, "the question of moral or social duty being for the judge, each judge must decide it as best he can for himself."¹⁸ On the one hand are judges who hold that the moral duty not to publish matter defamatory of another which he does not know to be true, is stronger than the duty to convey to a third person that which he believes to be true, although such third person would be affected if the matter were true.¹⁹ On the other hand, are judges who hold that a person having information materially affecting the interests of another, is under a stronger social and moral duty to communicate that information, than to guard the reputation of the person defamed by such information.²⁰

383. The Performance of a Duty to the Public. Examples of privileged occasions connected with the performance of a public duty are numerous. Charges and communications made in the prosecution of an inquiry into a suspected crime;²¹ complaints

Rose v. Tholborn, 153 Mo. App. 408, 134 S. W. 1093 (1911); *Nicholson v. Dillard*, 137 Ga. 225, 73 S. E. 382 (1911), applying Civil Code of 1910, §§ 4436, 4437.

16. *Cooke v. Wildes*, 5 E. & B. 328, 24 L. J. Q. B. 367 (1855); *Lawless v. Anglo-Egyptian Cotton Co.*, L. R. 4 Q. B. 262, 10 B. & S. 226, 38 L. J. Q. B. 129 (1869); *Byam v. Collins*, 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129 (1888).

17. See prevailing and dissenting opinions in *Byam v. Collins*, *supra*, and the opposing views in *Coxhead v. Richards*, 2 M. G. & S. 569, 15 L. J. C. P. 278 (1846), and in *Stuart v. Bell* (1891), 2 Q. B. 341, 60 L. J. Q. B. 577.

18. *Lindley*, L. J., in *Stuart v. Bell*, *supra*.

19. *Coltman and Cresswell*, JJ., in *Coxhead v. Richards*, 2 M. G. & S. 569, 15 L. J. C. P. 278 (1846); *Earl, J.*, in *Byam v. Collins*, 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129 (1888); *Joanness v. Bennett*, 5 Allen (87 Mass.) 169 (1862).

20. *Tindal, C. J.*, and *Erle, J.*, in *Coxhead v. Richards*, *supra*.—; *Danforth, J.*, in *Byam v. Collins*, *supra*; *Richardson v. Gunby*, — Kan. —, 127 Pac. 533 (1912).

21. *Padmore v. Lawrence*, 11 A. & E. 380, 3 P. & D. 209 (1840); *Lightbody v. Gordon*, 9 Scotch Sess. Cases (4th Ser.) 934 (1882); *Dale v. Harris*, 109 Mass. 193 (1872); *Klinck v. Colby*, 46 N. Y. 427 (1871).

to superior officials of misconduct on the part of subordinates;²² arguments presented to legislative committees, or to the executive department, against a bill under consideration;²³ charges and communications in regularly conducted trials before the proper authorities of religious, social and similar organizations,²⁴ and in investigations by legislative committees concerning the fitness of executive nominees for official positions,^{24a} have been repeatedly adjudged to be statements made upon a privileged occasion.

In all of these cases, however, the courts have been careful to point out the limitations of the privilege. The defendant is not allowed to abuse the occasion. His charges, complaints and communications are not to be spread broadcast through the community. Their dissemination is to be restricted to those who have an interest or duty in dealing with them.²⁵ And the defendant must act in good faith. If he does not know or believe them to be true, or if, when stating them, he is not discharging a duty or protecting his legitimate interests, he exceeds the privilege of the occasion, and becomes liable for the harm done to the plaintiff by his defamatory communications.²⁶ In such circumstances, he is said to act *mala fide*; to be prompted by an indirect and wrong motive; to be

- 22.** *Harrison v. Bush*, 5 E. & B. 344, 25 L. J. Q. B. 25, 99 (1855); —, 128 Pac. 126 (1912); *Posnett v. Proctor v. Webster*, 16 Q. B. D. 112, 55 L. J. Q. B. 150 (1885); *Jenoure v. Delmege* (1891), A. C. 73, 60 L. J. P. C. 11; *McIntyre v. McBean*, 13 Up. Can. Q. B. 534 (1856); *Brannaman v. Hinkle*, 137 Ind. 496, 37 N. E. 546 (1893); *Wieman v. Mabee*, 45 Mich. 484, 40 Am. R. 477 (1881).
- 23.** *Woods v. Wiman*, 122 N. Y. 445, 25 N. E. 919 (1890).
- 24.** *Etchison v. Pergerson*, 88 Ga. 620, 15 S. E. 680 (1891); *Redgate v. Roush*, 61 Ks. 480, 59 Pac. 1050 (1900); *Piper v. Woolman*, 43 Neb. 280, 61 N. W. 588 (1895); *Shurtleff v. Stevens*, 51 Vt. 501 (1879); *York v. Pease*, 2 Gray (68 Mass.) 282 (1854); *Holt v. Parsons*, 23 Tex. 9 (1859).
- 24a.** *Tuohy v. Halsell*, — Okla. R. A. 162, 22 Am. St. R. 126 (1890).
- 25.** Cases in last four notes, *Hocks v. Sprangers*, 113 Wis. 123, 87 N. W. 1101 (1902), holding that a statement by one member of a church to another concerning the chastity of a third, over whom such other had no power of discipline, is not made on a privileged occasion; *Kruse v. Rabe*, 80 N. J. L. 378, 79 At. 316, 22 Ann. Cas. 477, and note, 33 L. R. A., N. S. 783 (1910), advice by attorney to client about a third party was given with undue publicity, and privilege lost.
- 26.** *Jackson v. Hopperton*, 16 C. B. N. S. 829, 12 W. R. 913 (1864).

impelled by actual malice. "When a defendant claims that the occasion of a libel or slander is privileged, and when it is held by a judge, whose duty it is to decide the matter, that the occasion is privileged, the question arises—under what conditions can the defendant take advantage of the privilege? If the occasion is privileged, it is for some reason, and the defendant is entitled to the protection of the privilege if he uses the occasion for that reason, but not otherwise. If he uses the occasion for an indirect reason or motive, he uses it, not for the reason which makes it privileged, but for another."²⁷

384. Defamation in Judicial Proceedings. We have seen that this is not absolutely privileged in this country. And yet it is not subject to the rules which govern cases of qualified privilege. If the defamation is pertinent and material to the controversy, it is not actionable, though it be both false and malicious.^{27a} This privilege is said to be based on a wholesome public policy which regards the public good, resulting from a free and untrammelled inquiry in courts of justice as paramount to the redress of occasional private wrongs which may result from an abuse of the privilege.^{27b}

385. Reports of Public Proceedings. It has long been settled that the publication of judicial proceedings is conditionally privileged—the condition being that the proceedings are public, are decent and fit for publication, and that the reports are full and fair, and their publication not inspired by actual malice.²⁸ The

²⁷. Brett, L. J., in *Clark v. Molyneux*, 3 Q. B. D. 237, 47 L. J. Q. B. 230 (1877). obscene and blasphemous libels, as reports of judicial proceedings; *Cowley v. Pulsifer*, 137 Mass. 392

^{27a}. *Miller v. Gust*, — Wash. —, 127 Pac. 845 (1912), and authorities cited in the opinion. (1884); and *Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731 (1888), reports of papers not

^{27b}. *Abbott v. Nat. Bank of Commerce*, 20 Wash. 552, 56 Pac. 376 (1899). used in open court; *Boogher v. Knapp*, 97 Mo. 122, 11 S. W. 45 (1889); *Millisch v. Lloyds*, 13 Cox C.

²⁸. *R. v. Wright*, 8 D. & E. 293 (1799); *Ryalls v. Leader*, L. R. 1 Exch. 296, 4 H. & C. 555, 35 L. J. Ex. 185 (1866); *Re Evening News*, 3 T. L. R. 255 (1886); *R. v. Carlile*, 3 B. & Ald. 167 (1819). The last two cases involved the publication of C. 575, 46 L. J. C. P. 405 (1877), the question was for jury whether the report gave to readers a fair notion of what took place in open court: *Stevens v. Sampson*, 5 Ex. D. 53, 49 L. J. Q. B. 120 (1879), and *Brown v. Prov. Tel. Co.*, 25 R., I. 117, 54 At.

reports of such proceedings are usually made without reference to the individuals concerned, and for the information and benefit of the public. The law, therefore, presumes that they are made in good faith. Moreover, the advantage to the community, from having the proceedings of courts of justice universally known, is deemed to more than counterbalance the inconvenience and hardship to the private persons, whose reputation may be harmed by reports of such proceedings.²⁹ This rule, according to the weight of modern authority, both in England and in this country, applies to preliminary investigations, and *ex parte* proceedings, which must result in a final determination,³⁰ but not to a petition for the removal of an attorney from the bar, before any opportunity for action thereon.^{30a}

The full and fair reports of parliamentary and legislative proceedings are also conditionally privileged, for reasons similar to those which apply to the publication of reports of judicial proceedings.³¹ No privilege attaches, however, to the publication of a resolution of a city council, which is not within the scope of its official authority,³² nor of the slander by a murderer at the time of his execution.^{32a}

1061 (1903). Reports were unfair and malicious: *Dorr v. U. S.*, 195 U. S. 138, 24 Sup. Ct. 808, 1 Ann. Cas. 697 (1904), sensational headlines made the report unfair; *Commercial Pub. Co. v. Smith*, 149 Fed. 704, 79 C. C. A. 410 (1907), question for the jury. *Assoc.* (1893), 1 Q. B. 65, 62 L. J. Q. B. 152; *McBee v. Fulton*, 47 Md. 403, 28 Am. R. 465 (1877); *Saunders v. Baxter*, 6 Helsk. (53 Tenn.) 369 (1871); *Metcalf v. Times Pub. Co.*, 20 R. I. 674, 72 Am. S. R. 900 (1898); *Conner v. Standard Pub. Co.*, 183 Mass. 474, 67 N. E. 596 (1903).

29. *Wason v. Walter*, L. R. 4 Q. B. 73, 8 B. & S. 671, 38 L. J. Q. B. 34 (1868); *Lewis v. Levy*, E. B. & E. 537, 27 L. J. Q. B. 282 (1857); *Beiser v. Scripps-McRae Pub. Co.*, 113 Ky. 383, 68 S. W. 457 (1902); *Ackerman v. Jones*, 37 N. Y. Superior Ct. 42 (1874), holding Ch. 130, L. 1854, now Code of Civil Proc., § 1907, merely delaratory of the common law on this point. **30a.** *Cowley v. Pulsifer*, 137 Mass. 392. *Accord*, *Nixon v. Dispatch P. Co.*, 101 Minn. 309, 112 N. W. 258, 11 Ann. Cas. 161 (1907). **31.** *R. v. Wright*, 8 D. & E. 293 (1799); *Wason v. Walter*, L. R. 4 Q. B. 73, 8 B. & S. 671, 38 L. J. Q. B. 34 (1868); *Kane v. Mulvaney, Jr.*, R. 2 C. L. 402 (1866). **32.** *Trebbv v. Transcript Pub. Co.*, 74 Minn. 84, 76 N. W. 961 (1898).

30. Cases in last note; also, *Usill v. Hales*, 3 C. P. D. 319, 47 L. J. C. P. 323 (1878); *Kimber v. Press* v. Currie, 168 Mich. 546, 134 N. W.

The burden of showing that the occasion is privileged is on the publisher of defamatory statements made at public meetings.^{32b}

In this country, the publication of the proceedings of quasi-public bodies, such as the State Medical Societies and ecclesiastical commissions, has been deemed conditionally privileged;³³ and in England, the official publication by such bodies of their proceedings is conditionally privileged.³⁴

386. Newspaper Reports of Public Meetings. No privilege attaches, at common law, to the reports in the public prints, of other proceedings than those above considered. "Professional publishers of news are not exempt, as a privileged class, from the consequences of damage done by false news. Their communications are not privileged merely because made in public journals."³⁵ In England, and in some of our States, statutes have been passed modifying this rule of the common law, and providing that fair and accurate reports of legislative and other public meetings shall be conditionally privileged.³⁶

387. Defamation in the Performance of Private Duty. The

1004 (1912). The resolution declared that the plaintiff was a disreputable person and had made an intentionally false and malicious report about the city's credit. The court declared that the council "had no more authority to libel the private character of a private citizen, than an assemblage of private citizens would have," citing *Buckstaff v. Hicks*, 94 Wis. 34, 68 N. W. 403, 59 Am. S. R. 853 (1896).

32a. *Sanford v. Bennett*, 24 N. Y. 20 (1861), applying Ch. 130, L. 1854, now N. Y. Code of Civil Proc., § 1907.

32b. *Montgomery v. New Era Pub. Co.*, 229 Pa. 165, 78 At. 85, 22 Ann. Cas. 375, and note (1910); *Heb-ditch v. Mac Ilwaine* (1894), 2 Q. B. 54, 58, 63 L. J. Q. B. 587.

33. *Barrows v. Bell*, 7 Gray (73 Mass.) 301 (1856); *Kirkpatrick v.*

Eagle Lodge, 26 Ks. 384, 41 Am. R. 316 (1881); *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. R. 698 (1879); *Bass v. Matthews* — Wash. —, 124 Pac. 384 (1912).

34. *Albutt v. Gen. Med. Council*, 23 Q. B. D. 400, 58 L. J. Q. B. 606 (1888).

35. *Barnes v. Campbell*, 59 N. H. 128 (1879); *Davison v. Duncan*, 7 E. & B. 229, 26 L. J. Q. B. 104 (1857); *Purcell v. Sowler*, 2 C. P. D. 215, 46 L. J. C. P. 308 (1877); *Kimball v. Post Pub. Co.*, 199 Mass. 248, 85 N. E. 103, 19 L. R. A., N. S. 862 (1908).

36. *Kelly v. O'Malley*, 6 T. L. R. 62 (1889); *Chaloner v. Landsdown*, 10 T. L. R. 290 (1894), applying 51 & 52 Vict., c. 64, sec. 4. (Law of Libel Amendment Act, 1888); *Garby v. Bennett*, 166 N. Y. 392, 59 N. E. 1117 (1901), under § 1907 N. Y. Code of

Civil Procedure.

commonest example of this species of conditional privilege is afforded by statements of employers about servants. While, as we have seen in a former connection, an employer is under no legal duty to a servant to give him a character,³⁷ and is under no legal duty, either, to answer inquiries about him by one about to employ him, he is under a private, moral duty of answering such inquiries. Accordingly, the law presumes that in making such answers, he acts in good faith. If they contain defamatory statements about the servant, he cannot recover against the employer without showing that the latter was inspired by actual malice.³⁸

In England, it is settled that the employer's statement is conditionally privileged, even when volunteered to one about to employ the servant.³⁹ This view is sustained by considerable authority in this country⁴⁰ and seems sound in principle. A communication, retracting a favorable character,⁴¹ as well as a statement of reasons for dismissing a servant,⁴² made to the latter, or his parents, or guardians, or fellow servants, is also conditionally privileged. These are but applications of the general rule, that a statement upon a subject in which the utterer has an interest, right or duty, to one having a corresponding interest, right or duty, is conditionally privileged.^{42a}

37. *Supra*, Chap. III.

38. *Edmonson v. Stevenson*, Bul. N. P. 8 (1766); *Child v. Affleck*, 9 B. & C. 403, 4 M. & R. 338 (1829); *Hollenbeck v. Ristine*, 105 Ia. 488; 75 N. W. 355 (1898); *Billings v. Fairbanks*, 139 Mass. 66, 29 N. E. 544 (1885).

39. *Coxhead v. Richards*, 2 C. B. 569, 15 L. J. C. B. 278 (1846). Tindal's opinion is now recognized as stating the correct rule. See *Stuart v. Bell* (1891), 2 Q. B. 341, 60 L. J. Q. B. 577.

40. *Hart v. Reed*, 1 B. Mon. (40 Ky.) 166 (1840); *Fresh v. Cutter*, 73 Md. 87, 20 At. 774 (1890); *Noonan v. Orton*, 32 Wis. 106 (1873).

41. *Gardner v. Slade*, 13 Q. B. 796, 18 L. J. Q. B. 334 (1849); *Fowles v. Bowen*, 30 N. Y. 20 (1864).

42. *Taylor v. Hawkins*, 16 Q. B.

308, 20 L. J. Q. B. 313 (1851); *Somerville v. Hawkins*, 10 C. B. 590, 20 L. J. C. B. 131 (1885); *Hunt v. Great N. Ry.* (1891), 2 Q. B. 189, 60 L. J. Q. B. 498; *Dale v. Harris*, 109 Mass. 193 (1872); *Hebner v. Great N. Ry.*, 78 Minn. 289, 80 N. W. 1128 (1899); *Missouri Pac. Ry. v. Richmond*, 73 Tex. 568, 11 S. W. 555 (1889).

42a. *Abraham v. Fox*, 52 Fla. 151, 42 So. 591, 10 Ann. Cas. 1148 (1906), with valuable note; *Tanner v. Stevenson*, 138 Ky. 578, 128 S. W. 878, 30 L. R. A., N. S. 200 (1910); *Holmes v. Royal Fraternal Union*, 222 Mo. 556, 121 S. W. 100, 26 L. R. A., N. S. 1080 (1909); *Konkle v. Haven*, 140 Mich. 472, 103 N. W. 850 (1905), letter from church member to the elders of the church concerning one who was about to become pastor.

388. Duty Arising from the Family Relation. Close family relationship imposes a duty upon persons to communicate information to their relatives about third persons, which does not exist in the case of strangers. Accordingly, a son-in-law acts upon a privileged occasion, in giving to his widowed mother-in-law information derogatory to the character of one whom she is about to marry.⁴³

389. Duty of Mercantile Agencies and Credit Associations. Statements rendered by mercantile or collection agencies to persons, making inquiries about persons with whom they propose to deal, are clearly privileged.⁴⁴ Whether the circulation among all of their subscribers of a sheet containing such statements, is privileged, is a question upon which authorities differ.⁴⁵ In a leading case, the majority of the court held it was not privileged.⁴⁶ Credit associations, organized for the mutual benefit of their members, have been held subject to the foregoing rules in this country.⁴⁷ It is quite important, however, that the agency or association reports only the information which it has received, and reports that with substantial accuracy. If it carelessly makes a mistake in reporting, its privilege may be forfeited.⁴⁸ Until recently, the English

43. *Todd v. Hawkins*, 8 C. & P. 88, Ga. 172 (1886); *Newbold v. Bradstreet*, 2 M. & R. 20 (1837), cited approvingly in *Byam v. Collins*, 111 N. Y. (1881); *Pollasky v. Minchener*, 81 Mich. 280, 46 N. W. 5 (1890); *Mitchell v. Bradstreet*, 116 Mo. 226, 22 Ann. 904, 22 So. 44 (1897).

44. *Howland v. Blake Mfg. Co.*, 156 Mass. 543, 31 N. E. 656 (1892); *Ormsby v. Douglass*, 37 N. Y. 477 (1868); *S. P. in Waller v. Lock*, 7 Q. B. D. 622, 51 L. J. Q. B. 274 (1882); *Robshaw v. Smith*, 38 L. T. 423 (1878).

45. See *Douglass v. Daisley*, 114 Fed. 628, 52 C. C. A. 324, 57 L. R. A. 475 (1892), and authorities cited. Also *Odgers, Libel and Slander* (3d Ed.) 273.

46. *King v. Patterson*, 49 N. J. L. 417, 9 At. 705, 60 Am. R. 622 (1887). See also *Johnson v. Bradstreet*, 77

street, 57 Md. 38, 40 Am. R. 426 (1871); *Bradstreet v. Gill*, 72 Tex. 115, 9 S. W. 753, 2 L. R. A. 405 (1898); *State v. Lonsdale*, 48 Wis. 348, 4 N. W. 390 (1879); *Trussell v. Scarlett*, 18 Fed. 214 (1882), with note; *Locke v. Bradstreet*, 22 Fed. 771 (1885).

47. *Woodhouse v. Powles*, 43 Wash. 617, 86 Pac. 1063, 8 L. R. A., N. S. 783, and note (1906).

48. *Douglass v. Daisley*, 114 Fed. 628, 52 C. C. A. 324, 57 L. R. A. 475 (1902). In this case the information received was that Daisley had

view appeared to be that the circulation of the agency sheets among all the subscribers was privileged, "as being a reasonable and usual method of conveying to the subscribers the information which they needed, for the safe conduct of their business."^{48a} But the Privy Council has declared that such agencies do not gather and disseminate information in the general interest of society and from a sense of duty, but "from motives of self interest by those who, for the convenience of a class, trade for profit in the characters of other persons, and who offer for sale information which, however cautiously and discreetly sought, may have been improperly obtained."^{48b}

390. Volunteered Statements for the Benefit of Recipient.

The older view in England, and that which obtains in some of our States, as we have seen, is that one who volunteers information to another, who has not asked for it, and with whom the volunteer has no confidential relations, nor common interests, acts at his peril. If the information is defamatory of a third person and false, he is liable for the damage done to such person's reputation. He is not acting upon a privileged occasion.⁴⁹

The present English rule, and that which seems to be gaining favor in this country,^{49a} has been stated as follows: "Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bona fide* and without malice does tell them, it is a privileged communication."⁵⁰ "It is not necessary in all cases that the in-

assigned certain property to T., to secure him for indorsing a note. The report made by the agency was that he had assigned to T. for the benefit of his creditors. Held, that it was a question for the jury, whether the mistake was due to carelessness, so as to destroy the privilege; McIntyre v. Weinert, 195 Pa. 52, 45 At. 666 (1900).

49. King v. Watts, 8 C. & P. 614 (1838); Buisson v. Huard, 106 La. 768, 31 So. 293 (1901) is based upon the fact that the defendant did not volunteer the statement complained of, but made it in response to inquiries.

49a. Bohlinger v. Germania L. Ins. Co., — Ark. —, 140 S. W. 257, 36 L. R. A., N. S. 449, with note (1911).

48a. Boxsius v. Goblet Freres (1894), 1 Q. B. 842, 63 L. J. Q. B. 401; Andrews v. Nott Bower (1895), 1 Q. B. 888, 64 L. J. Q. B. 536.

50. Davies v. Snead, L. R. 5 Q. B. 608, 39 L. J. Q. B. 202 (1870), Blackburn, J., followed in Stuart v. Bell (1891), 2 Q. B. 341, 60 L. J. Q. B.

48b. Macintosh v. Dun (1908), A. 577.

C. 390, 400, 77 L. J. P. C. 113.

formation should be given in answer to an inquiry.”⁵¹ The difficulty in applying this rule, it will be observed, arises in the answer to the question, “Was it right in the particular case, to volunteer to the third person the statement complained of?” As this question is for the judges, “each judge must decide it as best he can for himself.”⁵²

391. Defamation in Self-Defense. The rule on this topic has been formulated as follows: “Every statement made with the object of protecting some interest of the writer or speaker, and reasonably necessary for such purpose, is conditionally privileged.”⁵³ This interest may relate to the writer’s or speaker’s reputation,⁵⁴ or to his property,⁵⁵ and it may be an interest belonging to him exclusively,⁵⁶ or to him in common with others.⁵⁷

392. Fair Comment. This defense has been confounded at times with that of conditional privilege;⁵⁸ but the distinction between the two is perfectly clear and well settled.^{58a} When a defendant sets up the defense of conditional privilege he asserts and must prove that he stands in such a relation to the facts of the case, that he is justified in saying or writing what would be slan-

⁵¹ Jessel, M. R., in *Waller v. his property was in danger from the Lock*, 7 Q. B. D. 621, 51 L. J. Q. B. 274 (1882).

⁵² Lindley, L. J., in *Stuart v. Bell* (1891), 2 Q. B. 341, 60 L. J. Q. B. 577.

⁵³ Fraser’s *Law of Libel and Slander* (3d Ed.), p. 135. Accord, *Wells v. Pyne*, 141 Ky. 578, 133 S. W. 575 (1911).

⁵⁴ *Koenig v. Ritchie*, 3 F. & F. 413 (1862); *Laugton v. Bishop of Sudor*, L. R. 4 P. C. 495, 42 L. J. P. C. 11 (1872); *Shepherd v. Baer*, 96 Md. 152, 53 At. 790 (1902).

⁵⁵ *Squires v. Wason Mfg. Co.*, 182 Mass. 137, 65 N. E. 32 (1902). In *Browning v. Comm.*, 116 Ky. 282, 76 S. W. 19 (1904), it was held that defendant must show, that he had reasonable ground to believe, that

⁵⁶ *Smith v. Smith*, 73 Mich. 445,

41 N. W. 499, 3 L. R. A. 52, 16 Am. S. R. 594 (1889); *Livingston v. Bradford*, 115 Mich. 140, 73 N. W. 135 (1897).

⁵⁷ *Caldwell v. Story*, 107 Ky. 10, 52 S. W. 850 (1899); *Finley v. Steele*, 159 Mo. 299, 60 S. W. 109 (1900); *Warner v. Mo. Pac. Ry.*, 112 Fed. 114 (1901).

⁵⁸ *Henwood v. Harrison*, L. R. 7 C. P. 606, 41 L. J. C. P. 206 (1872); *Ross v. Ward*, 14 S. D. 240, 85 N. W. 182 (1901); *Schull v. Hopkins*, 26 S. W. 21, 127 N. W. 550 (1910).

^{58a} It seems to be recognized now in Massachusetts. *Hubbard v. Allyn*, 200 Mass. 166, 170, 86 N. E. 356 (1908); *Comm. v. Pratt*, 208 Mass. 551, 559, 95 N. E. 105 (1911).

derous or libelous in any one else. When his defense is fair comment, he asserts that he has done only what every one has a right to do, and that his utterance is not a libel, or slander, and would not be a libel or slander by whomsoever published.⁵⁹ To quote from a recent decision, "Comment of this kind is not privileged by reason of the occasion. What is really meant is that fair and *bona fide* comment and criticism upon matters of public concern is not libel, and that the words are not defamatory."^{59a}

393. Subjects of Fair Comment. Speaking generally, any matter of public interest is a proper subject of fair comment. "Nothing is more important," in the language of an eminent English judge, "than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men or the proceedings in courts of justice, or in Parliament, or the publication of a scheme, or a literary work."⁶⁰ This principle has found expression in various constitutional provisions in this country. For example, the Maryland Declaration of Rights asserts, "that any citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege."⁶¹

The subjects of fair comment which are most frequently involved in actions for defamation, are (1) the character and conduct of public men or candidates for office, and (2) literary, artistic or commercial productions, offered to the public.⁶²

⁵⁹. Blackburn, L. J., in *Campbell v. Spottiswoode*, 3 B. & S. 769, 32 L. J. Q. B. 185 (1863).

^{59a}. *Merrey v. Guardian Pub. Co.*, 79 N. J. L. 177, 184, 74 At. 464 (1909). Accord, *Diener v. Star-Chronicle Pub. Co.*, 232 Mo. 416, 132 S. W. 1143 (1910); *Cook v. Publishing Co.*, 241 Mo. 326, 357, 359, 145 S. W. 480 (1912); *Bingham v. Gaynor*, 203 N. Y. 27, 33, 96 N. E. 84 (1911).

⁶⁰. Crompton, J., in *Campbell v. Spottiswoode*, 3 B. & S. 769, 32 L. J. Q. B. 185 (1863).

⁶¹. Quoted and explained in *Coffin v. Brown*, 94 Md. 190, 50 At. 567 (1901); *Diener v. Star-Chronicle Pub. Co.*, 232 Mo. 416, 132 S. W. 1143 (1910).

⁶². Ogdens, *Libel and Slander* (3d Ed.), p. 46, classifies these topics as follows: "1. Affairs of State. 2. The Administration of Justice. 3. Public Institutions and Local Authorities. 4. Ecclesiastical Matters. 5. Books, Pictures and Architecture. 6. Theatres, Concerts and other public entertainments. 7. Other appeals to the Public."

394. The Criticism of Public Men. "The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized.⁶³ Comments on government, on ministers and officers of State, on members of both houses of parliament, on judges and other public functionaries are now made every day, which half a century ago would have been the subject of actions, or of *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?"⁶⁴

That there is a clear distinction between the publication of personal abuse, and of fair comment upon the conduct and official character of men, engaged in managing public or semi-public affairs, is now well settled. Judge Cooley, speaking for the Supreme Court of Michigan,⁶⁵ once declared: "It is very certain that no declaration of this or any other court can convince the common reason, that this distinction is not plain and palpable. Few wrongs can be greater than the public detraction which has only abuse, or profit from abuse, for its object. Few duties can be plainer than to challenge public attention to official disregard of principles which protect public and personal liberty." Chief Justice Cockburn stated the rule upon this topic as follows: "Where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives, which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but was also well founded, an action is not maintainable."^{65a}

^{63.} It was established in this country much earlier than in England. See *Hogg v. Dorrah*, 2 Porter (Ala.), 212 (1835); *Sillars v. Collier*, 151 Mass. 50, 23 N. E. 723 (1890).

^{64.} Cockburn, C. J., in *Wason v. Walter*, L. R. 4 Q. B. 73, 8 B. & S. 671, 38 L. J. Q. B. 34 (1868).

^{65.} *Miner v. Tribune Co.*, 49 Mich. 358, 13 N. W. 773 (1882).

^{65a.} *Campbell v. Spottiswoode*, 3 B. & S. 769, 32 L. J. Q. B. 185 (1863). This topic is admirably discussed in *Pollock on Torts* (9th Ed.), 262-271.

395. What Comment on Personal Conduct Is Fair. Whether a particular statement is an unfair aspersion of personal character, or a fair comment upon public conduct, is generally a question for the jury.⁶⁶ In the Kentucky case cited in the last note, a publication appeared in the Courier-Journal charging that Vance had violated his oath of office as a supervisor of election, and with interfering with and bribing voters. The court instructed the jury to award the plaintiff damages, "if they believed the publication false and was made maliciously; and that malice was to be inferred or presumed from the falsity of the publication, but that if they believed the statements contained in the publication were substantially true, as published, or were reasonable and fair criticism of the acts and conduct of the plaintiff as supervisor, and were made in good faith and without malice, they should find for the defendants; and the court held that these instructions were substantially correct, and that the jury were the judges of the truth of the matter put in issue, and were also the judges of the reasonableness of the grounds upon which the newspaper's charges were based; that animadversions upon the conduct of a public officer, however severe, were not libelous if confined within the limits of fair and reasonable criticism, and based on facts."⁶⁷

Another court has defined fair comment in the following terms: "Real comment is merely the expression of opinion. Misdescription is a matter of fact. If the misdescription is such an unfaithful representation of a person's conduct as to induce people to think that he has done something dishonorable, disgraceful and contemptible, it is clearly libelous. To state accurately what a man has done, and then to say that in your opinion such conduct is dishonorable, or disgraceful, is comment which may do no harm, as every one can judge for himself whether the opinion expressed is well founded or not. Misdescription of conduct, on the other hand, only leads to one conclusion detrimental to the person whose conduct is misdescribed, and leaves the reader no oppor-

⁶⁶ *Merivale v. Carson*, 20 Q. B. chere (1909), 2 K. B. 325 n, 329, 77 D. 275, 58 L. T. 331 (1887); *Vance L. J. K. B. 728*, decision of the v. *Courier Journal Co.*, 95 Ky. 41, House of Lords.

23 S. W. 591 (1893); *Hunt v. Star Newspaper Co.* (1908), 2 K. B. 309, *Evening Post Co. v. Richardson*, 113 77 L. J. K. B. 732; *Kakhyl v. Labou-* Ky. 641, 68 S. W. 665 (1902).

tunity of judging for himself of the conduct condemned, nothing but a false picture being presented for judgment."⁶⁸

At times, however, the statement is clearly an aspersion of private character, and the court does not hesitate to declare that it is not fair comment.⁶⁹ On the other hand, the statement may be unquestionably fair as a comment or criticism, and the court may dispose of the case without submitting it to a jury.⁷⁰

396. Criticism of Candidates for Public Office. There is some authority for the view that defamatory statements concerning a candidate for public office are conditionally privileged, when made by electors or when made to them; that in such a case the defamed candidate, in order to recover, must prove not only the falsity of the statement but also that the defendant published it in bad faith.⁷¹ The weight of authority, however, is opposed to this view. Most courts have approved of the rule, announced by Chief Justice Parsons, in an early Massachusetts case, as follows: "When

^{68.} *Christie v. Robertson*, 10 New S. Wales L. R. 157, 161 (1889). In *Dakhyl v. Labouchere*, supra, Lord Atkinson said: "A personal attack may form part of a fair comment upon facts truly stated, if it be warranted by those facts—in other words, in my view, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the judge, but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn."

^{69.} *Advertiser Co. v. Jones*, 169 Ala. 196, 53 So. 759 (1910); *Coffin v. Brown*, 94 Md. 190, 50 At. 567 (1901); *Bingham v. Mayor*, 141 App. Div. 301, 126 N. Y. Supp. 353 (1910); *affd.* 203 N. Y. 27, 96 N. E. 84 (1911).

^{70.} *Bearce v. Bass*, 88 Me. 521, 34 At. 411 (1896); *Kilgour v. Evening Star Co.*, 96 Md. 16, 53 At. 716 (1902); *Printing Co. v. Nethersole*, 84 Oh. St. 118, 95 N. E. 735, 23 Ann. Cas. 978, with note (1911).

^{71.} *Ross v. Ward*, 14 S. D. 240, 85 N. W. 182 (1901); *Mott v. Dawson*, 46 Ia. 533 (1877); *Bays v. Hunt*, 60 Ia. 251, 14 N. W. 785 (1882); *State v. Balch*, 31 Ks. 465 (1884); *Marks v. Baker*, 28 Minn. 162, 9 N. W. 678 (1881); *Briggs v. Garrett*, 111 Pa. 404, 2 At. 513 (1886); *Express Co. v. Copeland*, 64 Tex. 354 (1885). In *State v. Haskins*, 109 Ia. 656, 80 N. W. 1063 (1899), it was held that this privilege did not extend to the publication in a newspaper, circulated outside the district in which the candidate was running; following on this point, *Buskstaff v. Hicks*, 94 Wis. 34, 68 N. W. 463 (1896), and *Duncombe v. Daniel*, 1 W. W. & H. 101, 8 C. & P. 222 (1838).

any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his qualifications and fitness for the office; and publications of the truth on this subject, with the honest intention of informing the people, are not a libel, for it would be unreasonable to conclude that the publication of truths, which it is the interest of the people to know, should be an offense against the law. For the same reason, the publication of falsehood and calumny against public officers, or candidates for public offices, is an offense most dangerous to the people, and deserves punishment, because the people may be deceived, and reject the best citizens to their great injury, and, it may be, to the loss of their liberties.”⁷²

It is not always easy to apply this rule in a given case, but the distinction which is to be borne in mind is that between comment and criticism, on the one hand, and statements of fact, on the other. “It is one thing to comment upon or criticise, even with severity the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.”⁷³ Or to put it in another way: “An elector may freely canvass the character and pretensions of officers and candidates, but he has no right to calumniate one who is a candidate for office with impunity.”⁷⁴ “A public journal or an individual, who indulges in defamatory assertions about candidates for office, is equally liable for his acts with those who commit the same offense against private individuals.”⁷⁵

72. *Comm. v. Clap*, 4 Mass. 163, 3 O. St. 71, 33 N. E. 92 (1893); *Brewer Am. Dec.* 212 (1808); *Jarman v. v. Weakley*, 2 Overt. (2 Tenn.), 99, Rea, 137 Cal. 339, 70 Pac. 216 5 Am. Dec. 656 (1807); *Sweney v.* (1902; *Jones v. Townsend*, 21 Fla. Baker, 13 W. Va. 158, 31 Am. R. 757 431 (1885); *Rearick v. Wilcox*, 81 (1879). Ill. 77 (1876); *Belknap v. Ball*, 83 Mich. 583, 47 N. W. 674 (1890); *Aldrich v. Press Ptg. Co.*, 9 Minn. 133, 86 Am. Dec. 84 (1864); *Smith v. Burrus*, 106 Mo. 94, 16 S. W. 881, 13 L. R. A. 59, 27 Am. S. R. 329 (1891); *King v. Root*, 4 Wend. (N. Y.), 113, 21 Am. Dec. 102 (1829); *Hamilton v. Eno*, 81 N. Y. 116 (1880); *Mattice v. Wilcox*, 147 N. Y. 624, 42 N. E. 270 (1895); *Post Pub. Co. v. Molony*, 50 73. *Davis v. Shepstone*, 11 App. Cas. 187, 55 L. J. P. C. 51 (1886); *Burt v. Advertiser Co.*, 154 Mass. 238, 28 N. E. 1 (1891); *Hallam v. Post Pub. Co.*, 59 Fed. 530, 8 C. C. A. 201, 16 U. S. App. 613 (1893). 74. *Aldrich v. Press Printing Co.*, 9 Minn. 133, 86 Am. Dec. 84 (1864). 75. *Seeley v. Blair, Wright (O.)*, 358 (1833).

397. Criticism of Literary, Artistic or Commercial Productions and Displays. Every one who publishes a book,⁷⁶ or publicly exhibits a picture or other work of art,⁷⁷ or presents or takes part in a theatrical or other public performance,⁷⁸ or advertises or offers to the public an article for sale,⁷⁹ or engages in the construction and management of a railroad,⁸⁰ or other object of public interest,^{80a} "commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right."^{80b}

If, however, the commentator or critic does step aside from expressing his opinion of the book, or the work of art, or the performance, or the wares of the plaintiff, and indulges in defamation of the plaintiff himself, he is no longer exercising a fair and legitimate right; he is no longer exercising the function of a guardian of public morals or of correct literary or artistic taste; he is not engaging in fair discussion in order to promote "the truth of history or the advancement of science," but he is committing a tort and must answer in damages for his injury of the plaintiff.⁸¹

76. Carr v. Hood, 1 Camp. 355, n. (1808); Cooper v. Stone, 24 Wend. (N. Y.) 434 (1840).

77. Soane v. Knight, Moo. & M. 74 (1827); Gott v. Pulsifer, 122 Mass. 235, 23 Am. R. 322 (1877).

78. Dibdin v. Swan, 1 Esp. 28 (1793); Green v. Chapman, 4 Bing. (N. C.) 92, 5 Scott, 340 (1837); Fry v. Bennett, 28 N. Y. 324 (1863).

79. Hunter v. Sharpe, 4 F. & F. 983 (1866); Paris v. Levy, 9 C. B. N. S. 342, 30 L. J. C. P. 11 (1861); Boynton v. Remington, 3 Allen (85 Mass.), 397 (1862).

80. Crane v. Waters, 10 Fed. 619 (1882).

80a. Bearce v. Bass, 88 Me. 521, 34 At. 411 (1896).

80b. Accord, Peter Walker & Son v. Hodgson (1908), K. B. 239, 78 L. J. K. B. 193.

81. Tabert v. Tipper, 1 Camp. 350 (1808); Strauss v. Francis, 4 F. & F. 939 (1866); Duplany v. Davis, 3 T. L. R. 184 (1887); Whistler v. Ruskin, Times, Nov. 26th, 27th, 1878; Hunter v. Sharpe, 4 F. & F. 983 (1866); Gott v. Pulsifer, 122 Mass. 235, 23 Am. R. 322 (1877); Cooper v. Stone, 24 Wend. (N. Y.) 434 (1840); Triggs v. Sun Printing & Pub. Co., 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. R. 841 (1904), reversing 91 App. Div. 259 (1904); Post Pub. Co. v. Peck, 199 Fed. 6, 17 (1912), "the damaging matter consists of ingenious, suggestive and sensational drawings and pictures connecting themselves with printed statements and lines, which were well calculated, through the force of subtle innuendoes, to bring both the book, the author, and his other writings into disrepute."

398. What Comment on Literary and Other Displays Is Fair? This question is generally for the jury. The court ordinarily leaves it to them to say "whether they think the limit of fair criticism has been passed."⁸² The jury are to be informed that "every latitude must be given to opinion and prejudice, and then they are to say whether any fair man would have made the comment or criticism in question on the work. * * * If it is no more than fair, honest, independent, bold, even exaggerated criticism, then their verdict will be for the defendant. * * * The court should give a very wide limit to the jury. Mere exaggeration or even gross exaggeration may not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limits. The question which the jury must consider is this: Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work criticised? If it goes beyond that, then they must find for the plaintiff; if they are satisfied that it does not, then it falls within the allowed limit, and there is no libel at all."⁸³ Applying these tests, it is clear that one who, under the pretense of criticism, makes a personal attack on the character of the author, the artist, the performer or the vendor, or who imputes to him something which he has never presented to the public, goes beyond the limits of fair comment and criticism.

399. Apology and Retraction. At common law, a defamer could not insist upon an opportunity to retract or apologise;⁸⁴ but he could give in evidence any apology or retraction that he had made, in mitigation of damages.⁸⁵ Lord Campbell's Act⁸⁶ modifies

⁸². Bowen, L. J., in *Merivale v. Sedgwick on Damages* (9th Ed.), § Carson, 20 Q. B. D. 275 (1887). 453 and cases cited; *Coffman v.*

⁸³. Lord Esher, M. R., in *Merivale v. Carson*, supra. *Spokane Chron. Pub. Co.*, 61 Wash. 1, 117 Pac. 596 (1911).

⁸⁴. *Royal Aquarium, etc., Society v. Parkinson* (1892), 1 Q. B. 431, 61 L. J. Q. B. 409. ⁸⁶. The Libel Act, 1843 (6 & 7 Vict. Ch. 96.) See *Ogders on Libel and Slander* (5th Ed.), 404 and Eng-

⁸⁵. *Smith v. Harrison*, 1 F. & F. 565 (1856); *Turton v. N. Y. Rec. Co.*, F. & F. 565 (1856).

144 N. Y. 144, 38 N. E. 1009 (1894);

the common law to some extent, and has been copied with variations in some of our States. The constitutionality of such legislation is not questionable in England, but has been vigorously assailed in this country. It has been sustained in Minnesota,⁸⁷ and in North Carolina, to the extent of relieving newspapers from punitive damages, when the defamatory statement was printed in good faith, under an honest mistake, and with reasonable ground of belief in its truth, and the newspaper prints promptly on demand "a full and fair correction, apology and retraction."⁸⁸ On the other hand, the legislation has been held unconstitutional, when it has provided that a retraction or apology should limit the victim's recovery to special damages,⁸⁹ or should change the presumption and burden of proof as to malice.⁹⁰

87. *Ahen v. Pioneer Press Co.*, 40 Minn. 117, 41 N. W. 936, 3 L. R. A. 532, 12 Am. St. R. 707 (1889).

88. *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648 (1904), but approving the decisions in the following note on the subject of general damages.

89. *Park v. Free Press Co.*, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. R. 540 (1885); *Han-*

son v. Krehbiel, 68 Kan. 670, 75 Pac. 1041, 64 L. R. A. 790 (1904).

90. *Byers v. Meridian Printing Co.*, 84 Oh. St. 408, 95 N. E. 917 (1911), holding § 11,343 of the Genl. Code of 1910 (§ 5094 of R. S.) unconstitutional, and rejecting the construction put on the statute in *Post Publishing Co. v. Butler*, 137 Fed. 723, 71 C. C. A. 309, with note (1905).

CHAPTER XI.

TRESPASS TO PROPERTY.

400. **Definition of Trespass.** Blackstone defines "trespass in its largest and most extensive sense," as, "any transgression or offense against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or to his property."¹ We are not now concerned with trespass, in any such large and extensive sense, but with the tort which consists in the unlawful disturbance of another person's possession of lands or goods.²

401. **Trespass to Realty.** "Every unauthorized, and, therefore, unlawful entry into the close of another is a trespass."³ The technical designation of it, at common law, is "trespass *quare clausum fregit*;" from the language of the old writ, which called upon the defendant to show cause *quare clausum querentis fregit* — why he had broken into plaintiff's close. "For, every man's land is in the eye of the law, inclosed and set apart from his neighbor's; and that, either by a visible and material fence, or by an ideal, invisible boundary, existing only in the contemplation of law, as when one man's land adjoins another's in the same field."⁴

A personal, bodily entry upon the land is not necessary to constitute a trespass. One who stands on his own land and throws stones or other missiles upon his neighbor's property,⁵ or kicks or strikes it,⁶ or removes a line fence which rests partly on the neighbor's land,⁷ or turns water upon his neighbor's land,⁸ or constructs

1. Commentaries, Vol. 3, p. 208. Clayton, 5 Mon. (21 Ky.) 4, 5

2. Kent's Commentaries, Vol. 4, p. (1827); Hay v. The Cohoes Co., 2 N. 120. Y. 159, 51 Am. Dec. 279 (1849).

3. Dougherty v. Stepp, 1 Dev. & Bat. (18 N. C.) 371 (1835); Brown 10 C. P. 10, 44 L. J. C. P. 24 (1874).
v. Manter, 22 N. H. 468, 472 (1851). 7. Garret v. Sewell, 108 Al. 521,

4. Commentaries, Vol. 3, p. 209. 18 So. 737 (1895).

5. Pickering v. Rudd, 4 Camp. 219, 8. Byrnes v. City of Cohoes, 67 N. 221, 1 Stark, 56 (1815); Prewitt v. Y. 204 (1876); Jutt v. Hughes, 67

eaves or other projection over the neighbor's land,⁹ is clearly liable for breaking the close of his neighbor. So, it is submitted, throwing or firing a missile, or sending a balloon through the air, over the land of another, amounts to a legal breaking of his close.¹⁰

402. Intention of Trespasser. It is also to be borne in mind, that the intent, with which an act is done, is not the test of liability of a party to an action for trespass.¹¹ A person may be ever so innocent of an intention to cross the invisible boundary of his neighbor's land, or he may believe that he has a perfect right to cross it, and yet his innocence and good faith will not protect him.¹² His conduct may be marked by the utmost civility,¹³ and even be actuated by a desire to benefit, or it may in fact benefit the owner.¹⁴ Still, if his entry was unauthorized, he is a trespasser, and liable accordingly. Mere inadvertence or accident in crossing the line will not save him from trespass;¹⁵ nor will plaintiff's failure to prove that defendant's act caused substantial damage. The law implies damage from the trespass.¹⁶ Even though the harm be so

N. Y. 267, 273 (1876); *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 498, 505 (1882).

9. *Smith v. Smith*, 110 Mass. 302 (1872); *Contra*, *Pickering v. Rudd*, 4 Camp. 219, 1 Stark, 56 (1815).

10. Dicta in *Kenyon v. Hart*, 6 B. & S. 249, 252 (1865); *Wandsworth Board v. United Tel. Co.*, 13 Q. B. D. 904, 53 L. J. Q. B. 449 (1884); *Whittaker v. Stangvick*, 100 Minn. 386, 111 N. W. 295, 10 L. R. A. N. S. 921 (1907), shooting through the air across plaintiff's land; *Butler v. Frontier Tel. Co.*, 186 N. Y. 486, 79 N. E. 716, 11 L. R. A. N. S. 920 (1906), ejection of telephone wires strung over plaintiff's land. "Trespass by Aeroplanes," 36 Law Mag. 8 Rev. 171, 176 (1911).

11. *Guille v. Swan*, 19 Johns (N. Y.) 381, 10 Am. Dec. 234 (1822); *Higginson v. York*, 5 Mass. 341 (1809).

12. *Pfeiffer v. Grossman*, 15 Ill. 53 (1853); *Baltimore, etc., Ry. v. Boyd*, 67 Md. 32, 10 At. 315, 1 Am. S. R. 362 (1887); *De Camp v. Bullard*, 159 N. Y. 450, 54 N. E. 26 (1899); *Murphy v. City of Fond du Lac*, 23 Wis. 365 (1868).

13. *Cannon v. Overstreet*, 2 Bax. (61 Tenn.) 464 (1872).

14. *Ketcham v. Newman*, 141 N. Y. 205, 36 N. E. 197, 24 L. R. A. 102 (1894).

15. *Basely v. Clarkson*, 3 Levinz, 37 (1681); *Newsom v. Anderson*, 2 Ired. (24 N. C.) 42, 37 Am. Dec. 406 (1841). *Contra*, *Keller v. Mosser*, Tappan (Ohio), 43 (1816).

16. *Dixon v. Clow*, 24 Wend. (N. Y.) 188 (1840); *Keil v. Chartiers Valley Gas Co.*, 131 Pa. 466, 19 At. 78, 17 Am. St. R. 823 (1890); *Carter v. Wallace*, 2 Tex. 206 (1847).

trifling, that plaintiff's witnesses are unable to place any estimate upon the injuries inflicted, yet, it is said, if no recovery could be had, the trespasser, by repetition of the act and the lapse of time, might acquire an easement in plaintiff's land, in spite of anything that could be done to prevent it.¹⁷

403. Mitigation and Aggravation of Damages. While the good faith of the trespasser can never bar an action, it may and often does operate to lessen the award of damages. In such a case as that cited in the last note, it would limit the recovery to a nominal sum. In the case of taking minerals,¹⁸ or trees,¹⁹ it reduces the recovery, in most jurisdictions, to the value of the property when first taken. On the other hand, the bad faith of the trespasser may enhance the award of damages.^{19a} If a telephone company unlawfully cuts the limbs of trees belonging to plaintiff, with knowledge that they are his, and especially if he does this after warning from the plaintiff not to do it, punitive damages may be awarded against him.²⁰

404. The right to damages for trespass to land, vests in the owner, as soon as the trespass is committed, and descends to his heirs.²¹ It does not merge in the title to the land subsequently ac-

17. *Norvell v. Thompson*, 2 Hill 334 (1880); *Dougherty v. Chestnut*, (S. C.), 470 (1834). In this case, 86 Tenn. 1, 5 S. W. 444 (1888). the trial judge charged the jury, **19.** *Wooden Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230 (1882); *Striegel v. Moore*, 55 Ia. 88, 7 N. W. 413 (1880); *Holt v. Hayes*, 110 Tenn. 42, 73 S. W. 111 (1902). that, if there were actually no damage done, or if it were so inconsiderable that it could not be estimated, as the defendant set up no claim to the land, and supposed he had permission of the real owner, they might find a verdict for the defendant; and they did so. This charge was held to be erroneous; **19a.** *Lesch v. Great Nor. Ry.*, 97 Minn. 503, 106 N. W. 955, 7 L. R. A. N. S. 93 (1906). **20.** *Memphis Telephone Co. v. Wing v. Seske* (Ia.), 109 N. W. 717 Hunt, 16 Lea (84 Tenn.), 456, 1 S. W. 159 (1886); *Cumberland Tel. Co. v. Poston*, 10 Pickle (94 Tenn.), 696, 30 S. W. 1040 (1895); *Telephone Co. v. Shaw*, 102 Tenn. 313, 52 S. W. 163 (1899). **21.** *Mountz v. Railroad Co.*, 203 Pa. 128, 52 At. 15 (1902).

18. *Livingstone v. Rawyards Coal Co.*, 5 App. Cas. 25, 42 L. T. N. S.

18. *Livingstone v. Rawyards Coal Co.*, 5 App. Cas. 25, 42 L. T. N. S.

21. *Mountz v. Railroad Co.*, 203 Pa. 128, 52 At. 15 (1902).

quired by the trespasser.²² Even though the trespasser be a dis-seizor, at the time of his trespass, he will still be liable after re-entry by the true owner.²³

It is to be borne in mind that the gist of the tort, which we are now considering, is the disturbance of the possession, and that whatever is done, after the breaking and entry, is but an aggravation of damages.²⁴ Even if the plaintiff declares for breaking his close and cutting his trees, he may recover, although he fails to prove that any trees were cut.²⁵

405. Injuries Which Are Not Trespass. A person's land may be injured by materials belonging to another, or by forces set in motion by another, and yet a trespass not be committed. If stones and other materials are carried upon plaintiff's land from defendant's, by a violent storm, or by other natural forces, plaintiff's possession is disturbed, but that disturbance is not due to trespass by defendant. It is due to an accident.²⁶ Again, the plaintiff's realty may be harmed "through the jarring of the ground or the concussion of the atmosphere, caused by explosions" of blasts set off on

22. *McClinton v. Railroad Co.*, 66 Pa. 404 (1870). which case the measure of damages is the diminished value of the

23. *Emerich v. Ireland*, 55 Miss. 390 (1877); *Alliance Trust Co. v. Nettleton Hardware Co.*, 74 Miss. 584, 21 S. W. 396, 36 L. R. A. 155 (1897), and cases cited therein. realty; or he may sue for the value of the trees, when the measure of damages will be their market value.

24. *Taylor v. Cole*, 3 D. & E. 292 (1789); *Curtis v. Groat*, 6 Johns. (N. Y.) 168, 5 Am. Dec. 204 (1810); *Smith v. Ingram*, 7 Iredell (29 N. C.), 175 (1847); *Carter v. Wallace*, 2 Tex. 206 (1847). **26.** *Snook v. Town Council of Bradford*, 14 Up. Can. Q. B. 255 (1856). Had these materials been so placed by plaintiff, as naturally to slide down upon plaintiff's land, there would have been a good case of trespass. *Gregory v. Piper*, 9 B. & C. 591, 4 M. & R. 500 (1829);

25. *Mundell v. Perry*, 2 Gill. & J. (Md.) 193 (1830); *Brown v. Manter*, 22 N. H. 468 (1851). In *Bailey v. Chic., M. & St. Paul Ry.*, 3 S. Dak. 531, 54 N. W. 596, 19 L. R. A. 653, with valuable note, it is held that where trees are destroyed or taken by a trespasser, the owner may sue for the injury to the realty, in *Ploof v. Putnam*, 83 Vt. 252, 71 At. 188, 26 L. R. A. N. S. 251 (1908), plaintiff's boat driven by wind to defendant's dock, not a trespass; *Campbell v. Race*, 7 Cush. (61 Mass.) 408 (1851); *Williams v. Safford*, 7 Barb. (N. Y.) 309 (1849), highway temporarily impassible.

defendant's adjoining premises.^{26a} If, however, such injuries are not due to materials hurled upon the land; if they are not due to the direct application of force, but are merely consequential, plaintiff cannot maintain an action for trespass. His remedy is an action on the case for negligence.²⁷

406. The possession of plaintiff, which entitles him to maintain an action for trespass to land, is not limited to a possession attendant upon his personal occupation of the premises. It is enough that there was an actual possession in the plaintiff, when the trespass was committed, or a constructive possession in respect of the right being actually vested in him.²⁸ This is true even of unclosed and unimproved lands,²⁹ unless there is an adverse possession or right in some other person, by contract or by operation of law, to the actual exclusion of the plaintiff.³⁰

Trespass may be maintained by a reversioner, when the breaking of the close results in injury to his interest in the lands.³¹ Accordingly, the unauthorized interference with trees in the highway, or the erection of telegraph poles, or other structures in the highway, which interfere with the reasonable use of his premises by the adjoining owner, and impose a new burden upon them, is generally treated as a trespass against such owner, when the fee to the highway at the point in question, is in him.³²

^{26a}. Page v. Dempsey, 184 N. Y. 245, 77 N. E. 9 (1906). ³⁰. Storrs v. Feick, 24 W. Va. 606 (1884).

²⁷. Sullivan v. Dunham, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. R. 274 (1901); Holland House Co. v. Baird, 169 N. Y. 136, 62 N. E. 119 (1901). ³¹. Bigelow's Leading Cases on Torts, p. 355; Devellin v. Snellin-burg, 132 Pa. 186, 11 At. 1119 (1890).

²⁸. Kent's Commentaries, Vol. 4, p. 120; Bulkley v. Dolbeare, 7 Conn. St. R. 219 (1891); Broome v. N. Y. 232 (1828); McColman v. Wilkes, 3 Strob. (S. C.) 465 (1849); Wilson v. Phoenix Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. R. 890 (1895). ³². Chesapeake, etc., Co. v. McKenzie, 74 Md. 36, 21 At. 690, 28 Am. etc., Co., 42 N. J. Eq. 141, 7 At. 851 (1886); Western Union Tel. Co. v. Williams, 86 Va. 696, 11 S. E. 106, 19 Am. St. R. 908, 8 L. R. A. 429 (1890); Kreuger v. Wis. Tel. Co., 106 Wis. 96, 81 N. W. 1041, 50 L. R. (1887); Irwin v. Patchen, 164 Pa. A. 298 (1900).

²⁹. Baltimore, etc., Co. v. Boyd, 67 Md. 32, 10 At. 315, 1 Am. St. R. 362 (1887); Irwin v. Patchen, 164 Pa. A. 298 (1900). 51, 30 At. 436 (1894).

407. Trespass by Animals. The common law held the owner³² and the custodian³⁴ of cattle liable for their trespasses.^{34a} He was under an absolute duty to keep them upon his own premises; and, if they wandered therefrom, and broke into the close of another, their owner was liable for all the damages which they inflicted, whether he had notice or not of their propensity to do the particular mischief.³⁵

This has been modified by general custom,³⁶ or by statute³⁷ in many of our jurisdictions, and the rule has become established that the land-owner must fence against the cattle of his neighbor running at large. Under such custom or statutes, however, no privilege accrues to the cattle owner to drive his animals upon the unfenced land of another, and appropriate their pasturage to himself. If he does this he becomes a trespasser³⁸ and makes himself liable for the fair rental of the land thus used.³⁹ Even when his cattle accidentally stray upon unfenced land, although he is not answerable for their trespass, the land-owner may drive and keep them

32. Gresham v. Taylor, 51 Al. 505 (1874); Crawford v. Hughes, 3 J. J. Marsh. (26 Ky.), 433 (1830); Noyes v. Colby, 30 N. H. 143 (1855); Wells v. Howell, 19 Johns. (N. Y.) 385 (1822); Rossell v. Cottom, 31 Pa. 525 (1858).

33. Logan v. Gedney, 38 Cal. 579 (1869); Seeley v. Peters, 5 Gilman (Ill.), 130 (1848); Kerwhacker v. Cleveland, etc., Ry., 3 O. St. 172, 62 Am. Dec. 246 (1854); Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618 (1890), affirming S. C. 5 Utah, 591, 18 Pac. 633 (1888).

34. Tewsbury v. Bucklin, 7 N. H. 518 (1834).

34a. Petey Mfg. Co. v. Dryden, 5 Pen. (Del.) 166, 62 At. 1056 (1904), trespass *quare clausum fregit* is an inappropriate remedy to recover for injuries done by bees to the person or property of another; the only liability of the owner is for negligence.

35. Decker v. Gammon, 44 Me. 322, 69 Am. Dec. 99 (1857); Lyons v. Merrick, 105 Mass. 71 (1870); Angus v. Radin, 5 N. J. L. 815, 8 Am. Dec. 626 (1820); Malone v. Knowlton, 15 N. Y. Supp. 506, 39 N. Y. S. R. 901 (1891); Morgan v. Hudnell, with valuable note (1900).

52 O. St. 552, 40 N. E. 716, 27 L. R. A. 862, 49 Am. St. R. 741 (1895); Dolph v. Ferris, 7 W. & S. (Pa.) 367, 42 Am. Dec. 246 (1844); Mosier v. Beale, 43 Fed. 358 (1890).

36. Logan v. Gedney, 38 Cal. 579 (1869); Seeley v. Peters, 5 Gilman (Ill.), 130 (1848); Kerwhacker v. Cleveland, etc., Ry., 3 O. St. 172, 62 Am. Dec. 246 (1854); Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618 (1890), affirming S. C. 5 Utah, 591, 18 Pac. 633 (1888).

37. Lazarus v. Phelps, 152 U. S. 81, 14 Sup. Ct. 477, 38 L. Ed. 363 (1894).

38. Cosgriff v. Miller, 10 Wy. 190, 68 Pac. 206 (1902); Poindexter v. May, 98 Va. 143, 34 S. E. 971 (1900).

39. Lazarus v. Phelps, 152 U. S. 81, 14 Sup. Ct. 477, 38 L. Ed. 363 (1894); Monroe v. Cannon, 24 Mont. 316, 61 Pac. 863, 81 Am. St. R. 439 (1900).

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off; ⁴⁰ and the latter is under no duty to keep such premises in a safe condition for them.⁴¹ His duty is only to refrain from inflicting upon them wanton or willful injury.

408. In an early English case, Lord Holt declared that the liability for trespasses of animals, is limited to beasts in which the defendant has a valuable property.⁴² Although this statement is mere dictum, it has been accepted by many courts as a correct statement of the law.⁴³ Accordingly these courts have held that the owner of dogs and cats is not answerable for their trespasses upon land, as he is for those of his cattle. These animals, it is said, are not so absolutely the chattels of the owner as to be the subject of larceny; their wanderings ordinarily cause but slight damage, and common usage accords them a wider liberty than is permitted to cattle, horses, sheep, and the like.⁴⁴

Other courts have declined to accept Lord Holt's dictum, and have held the owner of a dog to the same responsibility for its trespasses, as attaches to the owner of an ox or horse.⁴⁵ Accordingly, if a dog, unleashed and unmuzzled, in violation of an ordinance, attacks and kills a cat on the premises of the cat owner, the dog

40. *Addington v. Canfield*, 11 Okl. 204, 66 Pac. 355 (1901). that "if the owner trespass and his dog attend him, and do mischief

41. *Beinhorn v. Griswold*, 27 Mon. 79, 59 L. R. A. 771, 69 Pac. 557 (1902); *Knight v. Abert*, 6 Pa. 472, 47 Am. Dec. 478 (1847); *Clarendon Land Co. v. McClelland Bros.*, 89 Tex. 483, 34 S. W. 98, 59 Am. S. R. 70 (1896). unbidden, the owner is liable."

42. *Mason v. Keeling*, 12 Mod. 332, 1 Ld. Ray. 606 (1700). 44. *Willes, J.*, in *Read v. Edwards*, 17 C. B. N. S. 245, 260, 34 L. J. C. P. 31 (1864); *Smith v. Donohue*, 49 N. J. L. 548, 60 Am. R. 652 (1887).

43. *Brown v. Giles*, 1 C. & P. 118, 12 E. C. L. 79 (1823); *Saunders v. Teape*, 51 L. T. N. S. 263, 48 J. P. 757, 29 A. L. J. 321 (1884). In *De-well v. Sandars*, Cro. Jac. 490 (1619), it was declared that the owner of a dovecote is liable if his pigeons eat his neighbors' grain. In *Woolf v. Chalker*, 31 Conn. 121, 51 Am. Dec. 175 (1862), it was held that "if the owner trespass and his dog attend him, and do mischief unbidden, the owner is liable." 45. *Doyle v. Vance*, 6 Vict. L. R. (Cases at Law) 87 (1880); *Churnot v. Lawson*, 43 Wis. 536, 28 Am. R. 567 (1878), *Ryan, C. J.*, dissented; cf. *Crowley v. Groonell*, 73 Vt. 45, 50 At. 546, 55 L. R. A. 876 (1901), where the owner of a dog was held liable for his jumping against the plaintiff and knocking him down, even though he jumped in playfulness. The test laid down is: had the owner, as an ordinarily prudent person, reason to anticipate the injury, which actually occurred?

owner is liable in damages, whether he knew of the dog's vicious propensity or not.^{45a}

409. Trespasses by Animals Driven Along Highways. For these, the owner or custodian is not liable, unless they are due to his negligence. This exception has been described by a learned judge as "absolutely necessary for the conduct of the common affairs of life."⁴⁶ It operates, however, only against owners of land abutting on the highway.^{46a}

410. Duty of Land-Owner to Trespassers. Although as we have seen in a previous connection, a trespasser is not an outlaw⁴⁷ he is not entitled to have the premises, upon which he is trespassing kept in a safe condition. The only legal duty which the land-owner owes him, is to abstain from inflicting upon him willful or wanton injury.⁴⁸ A different view is held in some jurisdictions, when the trespasser is an infant, especially if there is ground for finding that he has been enticed upon the dangerous premises, by the land-owner.⁴⁹

411. Trespass to Chattels. This consists, ordinarily, in wrongfully taking or destroying personal property. It has been said that trespass does not lie for an assault upon a ship, or other insensate thing,⁵⁰ but that it does for beating and wounding a beast.⁵¹ The

45a. *Buchanan v. Stout*, 139 App. Mass. 349, 28 N. E. 283, 13 L. R. Div. 204, 123 N. Y. Supp. 724 (1910). A. 248, 26 Am. S. R. 253 (1891);

46. *Tillett v. Ward*, 10 Q. B. D. 17, *Christian v. Illinois Cent. Ry.*, 71 52 L. J. Q. B. 61 (1882); *Hartford Miss.* 237, 12 So. 710 (1894); *Bien-v. Brady*, 114 Mass. 466, 19 Am. R. horn v. Griswold, 27 Mon. 79, 69 377 (1874); *Barnum v. Turpening*, Pac. 557, 59 L. R. A. 771 (1902). 75 Mich. 557, 42 N. W. 967 (1874); **49.** *Union Pac. Ry. v. McDonald*, Moynahan v. Wheeler, 117 N. Y. 152 U. S. 262, 14 Sup. Ct. 619, 38 L. 285, 22 N. E. 702 (1889). Ed. 434 (1894).

46a. *Wood v. Snider*, 187 N. Y. 28, 79 N. E. 858, 12 L. R. A. N. S. 912 (1907). If the cattle stray across land abutting on the highway to unfenced land of another owner, the cattle owner is liable in trespass. **50.** *Marlow v. Weekes*, Barnes' Notes of Cases, 452 (1744). The decision in *Paul v. Slason*, 22 Vt. 231, 54 Am. Dec. 75 (1850), accords with the above dictum, but it was based upon the maxim, *de minimis non curat lex*.

47. *Supra*, ¶ 91.

48. *Jordan v. Grand Rapids Ry.*, 162 Ind. 464, 70 N. E. 524 (1904); **51.** *Marlow v. Weekes*, *supra*, *Dand v. Sexton*, 3 D. & E. 37 (1789). *Daniels v. New York, etc., Ry.*, 154

better view seems to be, however, that any wrongful disturbance of another's possession, whether amounting to an asportation or destruction or not, and whether depriving the plaintiff of the valuable use of the property or not, is an actionable trespass.⁵²

It is not necessary that actual force be applied to the property. If the defendant intentionally frightens plaintiff's horse so that it runs away and is injured, he is liable in trespass as he would have been, had he beaten and wounded the animal by the direct application of force.⁵³ So, if an officer unlawfully levies upon plaintiff's property, he is a trespasser, although there is no manual taking or removal.⁵⁴ And if one sets fire upon his land, he is liable in trespass, if it escapes and harms another's goods.⁵⁵

412. Intention to inflict harm is not material; the same rule applying to trespasses to goods, that we have found applying to real-property trespasses. One, who interferes with the possession of goods, acts at his peril,⁵⁶ and is answerable "not only for the bare

52. Pollock's Torts (6th Ed.), pp. 334, 335; Alderson, B., in *Fouldes v. Willoughby*, 8 M. & W. 540, 549 (1841); Bull v. Colton, 22 Barb. (N. Y.), 94 (1856). No allegation that plaintiff lost the use of the horse. In *Fullam v. Stearns*, 30 Vt. 443, 456 (1857), the opinion is expressed that there may have been a trespass in *Paul v. Slason*, supra; cf. *Pope v. Cordell*, 47 Mo. 251 (1871). Fitzherbert's *Natura Brevium*, 88 M. and 89, L. shows that the writ of trespass could be had for breaking one's mill-stone, or chasing his sheep or swine to their injury.

53. *Jordan v. Wyatt*, 4 Gratt. (45 Va.) 151, 47 Am. Dec. 720 (1847).

54. *Dexter v. Cole*, 6 Wis. 319, 70 Am. Dec. 465 (1858), defendant attempted to separate plaintiff's sheep from his own flock, but inadvertently drove off four belonging to plaintiff.

It is not trespass for one, lawfully driving cattle or sheep on the highway, to drive animals, which mix with his, to a convenient place for separating them, *Van Valkenburg v. Thayer*, 57 Barb. (N. Y.) 196 (1870); but it is trespass for him to drive them away with his, without taking reasonable precautions to discover and separate them, *Young v. Vaughan*, 1 Houst. (Del.) 331 (1857); *Brooks v. Olmstead*, 17 Pa. 24 (1851).

55. *Cole v. Fisher*, 11 Mass. 137 (1814); *Loubz v. Hofner*, 1 Dev. L. (12 N. C.) 185 (1827); *James v. Caldwell*, 7 Yerg. (15 Tenn.) 38 (1834); *Waterman v. Hall*, 17 Vt. 128, 42 Am. Dec. 484 (1844).

56. *Miller v. Baker*, 1 Met. (42 Mass.) 27 (1840); *Wintringham v.*

act of trespass, but also for the natural, immediate and direct consequences of that act.”⁵⁷

413. Possession of Plaintiff. This may be either actual or constructive. “It is established law, that he, who has the general property in a personal chattel, may maintain trespass for the taking of it, by a stranger, although he never had the possession in fact; for the general property in a personal chattel, draws to it possession in law.”⁵⁸

It is also established, that one, who illegally interferes with the possession of a chattel, is liable in trespass to the one whose actual possession is invaded⁵⁹ although such possession is illegal. A successful defense to the action of trespass must rest upon the rightfulness of the defendant’s conduct, not upon defects in the plaintiff’s title, or in his right to possession.⁶⁰ One may be a trespasser, even against a thief.⁶¹

57. *Bruch v. Carter*, 32 N. J. L. 554 (1867). Defendant untied plaintiff’s horse, led him to another post and hitched him. Here, he became entangled in his halter, was thrown to the ground and killed. Judgment upon verdict for plaintiff for the value of the horse affirmed.

58. *Bulkley v. Dolbeare*, 7 Conn. 232, 235 (1828); *Haythorn v. Rushforth*, 16 N. J. L. 160, 38 Am. Dec. 540 (1842); *Putnam v. Wyley*, 8 John. (N. Y.) 432, 5 Am. Dec. 346 (1811); *Edwards v. Edwards*, 11 Vt. 587, 34 Am. Dec. 711 (1839).

59. *Guttner v. Pac. Steam Whaling Co.*, 96 Fed. 617 (1899). Seamen on board an abandoned whaling bark successfully maintained trespass against the defendant, whose servants took the stores from the bark, although the seamen had bare possession and no ownership. “The peace and good order of society,” it

is declared, “require that persons thus in the possession of property, even without any title, should be enabled to protect such possession, by appropriate remedies against mere naked wrongdoers,” citing *Jeffris v. G. W. Ry.*, 5 E. & B. 802, 25 L. J. Q. B. 107 (1856); *Wheeler v. Lawson*, 103 N. Y. 40, 8 N. E. 360 (1886); *National Surety Co. v. U. S.*, 129 Fed. 70, 63 C. C. A. 512 (1904).

60. *Brown v. Ware*, 25 Me. 411 (1845); *Commonwealth v. Rourke*, 10 Cush. (64 Mass.) 397 (1852); *Ewings v. Walker*, 9 Gray (75 Mass.), 95 (1857); *Odiorne v. Colley*, 2 N. H. 66, 9 Am. Dec. 39, (1819); *Potter v. Washbun*, 13 Vt. 558, 37 Am. Dec. 615 (1840).

61. *Commonwealth v. Coffee*, 9 Gray (75 Mass.), 139 (1857); *Ward v. People*, 3 Hill (N. Y.), 395 (1842); *Fletcher v. Cole*, 26 Vt. 170, 177 (1853).

414. Excusable Trespasses. These have been dealt with, at considerable length, in a previous chapter,⁶² and their consideration need not be renewed here.

It will be recalled that a very extensive head of excuse, in cases of trespass, is that of license. When that license is abused it becomes important to inquire whether it was accorded to the defendant by the law, or by consent of the plaintiff.

415. Trespass Ab Initio. When the license is accorded by law, it is said that the law should make void everything done by the abuse of its authority, and leave the abuser as though he were a trespasser from the beginning. But where a man, who is under no necessity to give a license to another, does give it, and the licensee abuses the authority, there is no reason why the law should interpose to make void everything done by such abuse, because it was the man's folly to trust another with an authority, who was not fit to be trusted.⁶³

Accordingly, where one distrains property,⁶⁴ or takes up an estray,⁶⁵ and converts or abuses it, he is liable as a trespasser *ab initio*. So is an officer who seizes property or arrests a person under legal process, and then abuses the authority given him by the law — as by unreasonable delay in removing the property,⁶⁶ or by charging illegal fees.⁶⁷ So is one who secures entrance upon plaintiff's land by authority of the law, and then abuses the license.⁶⁸

416. On the other hand, if the license proceeds from the plaintiff, an abuse of it will not make the original entry upon the land a

⁶². Chapter III.

-29 At. 981 (1894), and cases cited.

⁶³. *Allen v. Crofoot*, 5 Wend. (N. Y.) 506 (1830).

⁶⁸. *Gardner v. Rowland*, 2 Ire. (24 N. C.) 247 (1842); *Adams v.*

⁶⁴. *Duncombe v. Reeve*, Croke Eliz. 783 (1601).

Rivers, 11 Barb. (N. Y.) 390 (1851); *Harrison v. Duke of Rutland* (1893),

⁶⁵. *Bagshaw v. Goward*, Croke Jac., 147, 1 Yelv. 96, Noy, 119 (1606); *Adams v. Adams*, 13 Pick. (30 Mass.) 384 (1832).

1 Q. B. 142, 62 L. J. Q. B. 117, 47 A. L. J. 329; *May v. Western U. T. Co.*, 157 N. C. 416, 72 S. E. 1059, 37 L. R. A. N. S. 912 (1911), defendant

⁶⁶. *Williams v. Powell*, 101 Mass. 467 (1869).

liable for mental distress of plaintiff caused by the violent and abu-

⁶⁷. *Robbins v. Swift*, 86 Me. 197,

sive conduct of its agents.

trespass, although the abuser's act may be in itself a trespass.⁶⁹ And it is to be borne in mind, that the abuse of the authority of law, which makes a man a trespasser *ab initio*, is the abuse of some special and particular authority, and has no reference to the general rule which makes acts lawful which the law does not forbid.⁷⁰ Moreover, defendant's conduct must amount to a trespass, as distinguished from mere non-feasance and breach of contract.⁷¹

69. Hubbell v. Wheeler, 2 Aik. a trespasser from the time he ex-
 (Vt.) 359 (1827); Jewell v. Mahood, ceded the purpose for which he
 44 N. H. 47 (1863); Allen v. Cro- was permitted to enter;" Perry v.
 foot, 5 Wend. (N. Y.) 506 (1830); Bailey, 94 Me. 50, 46 At. 789 (1900).
 The Six Carpenters's Case, 8 Coke, 70. Esty v. Wilmot, 15 Gray (81
 146, a. (1610); Snedecor v. Pope, Mass.), 168 (1860).
 143 Ala. 275, 39 So. 318 (1904), 71. The Six Carpenters Case, 8
 "though defendant entered certain Coke, 146, a. (1610); Abbot v. Kim-
 premises under a license, he became ball. 19 Vt. 551 (1847).

CHAPTER XII.

TROVER AND CONVERSION.

417. **The Fiction of Finding.** Originally, the action of trover was "an action of trespass on the case for the recovery of damages against a person who had found goods, and refused to deliver them to the owner upon demand, but had converted them to his own use."¹ The allegation of finding was often fictitious, but the defendant was not allowed to deny the fiction; and in modern times the allegation is treated as unnecessary.² The substance of the action, to-day, is for the wrongful interference with the plaintiff's dominion over the property in question.³

In many cases, the plaintiff has his option to sue for trespass or for conversion.⁴ This is true, whenever the defendant's conduct is a wrongful interference with the plaintiff's possession and with his right as owner.⁵

1. *Smith v. Grove*, 12 Mo. 51 (1848); *Chapman & Co.*, 126 Fed. 68 (1903), the court said: "The distinction between trespass and conversion is

2. *Royce v. Oakes*, 20 R. I. 252, 38 At. 371, 39 L. R. A. 845 (1897); *Burroughs v. Bayne*, 5 H. & N. 296, 29 L. J. Ex. 188 (1869). this: that trespass is an unlawful taking—as, for example, the unlawful removal of the property—while conversion is an unlawful

3. Cases in last two notes; *Davis v. Hurt*, 114 Ala. 146, 21 So. 468 (1896); *Payne v. Elliott*, 54 Cal. 339 (1880); *Platt v. Tuttle*, 23 Conn. 233 (1854); *Harris v. Saunders*, 2 Strob. Eq. (S. C.) 370 (1835); approving of the following definition: "A conversion seems to consist in any

4. In *Montgomery, etc., Co. v.* 5. *Bassett v. Maynard*, 1 Rolle Abd. 105 M. pl. 5 (1601); *Bishop v. Montague*, Cro. Eliz. 824 (1601), S. C. Cro. Jac. 50 (1604); *Leverson v. Kirk*, 1 Rolle Abd. 105, M. pl. 10 (1610); *Dexter v. Cole*, 6 Wis. 320 (1858).

5. *Bassett v. Maynard*, 1 Rolle Abd. 105 M. pl. 5 (1601); *Bishop v. Montague*, Cro. Eliz. 824 (1601), S. C. Cro. Jac. 50 (1604); *Leverson v. Kirk*, 1 Rolle Abd. 105, M. pl. 10 (1610); *Dexter v. Cole*, 6 Wis. 320 (1858).

418. Subject Matter of Trover. While the fiction of finding remained an essential element of the cause of action, trover could be brought only for tangible chattels. At present, however, it lies for any species of personal property ⁶—for bank bills; ⁷ or other negotiable instruments; ⁸ for certificates of stock; ⁹ for copies of book accounts; ¹⁰ for timber or crops converted after severance from the realty; ¹¹ for domestic animals, ¹² as well as for animals of a wild nature which have been tamed, ¹³ or reduced to the legal ownership and control of the plaintiff; ¹⁴ and even for property which the plaintiff had no legal right to possess. ¹⁵ It does not lie, however, to protect the ownership of counterfeit money, or any other chattel, which the law treats as a nuisance, and outside the pale of legal toleration. ¹⁶

419. Against Whom the Tort May Be Committed. It is not necessary that the plaintiff be the true owner of the goods in question. If he has a special property therein, as bailee, ¹⁷ or as receiver under an order of the court, ¹⁸ or, if he is in actual possession at the time of their conversion by the defendant, ¹⁹ although that possession may be in the nature of a disseisin of the true

⁶ *State v. Omaha Nat. Bank*, 59 Neb. 483, 81 N. W. 483 (1899).

⁷ *Moody v. Keener*, 7 Porter (Al.) 218 (1838); *Royce v. Oakes*, 20 R. I. 252, 38 At. 371, 39 L. R. A. 845 (1897).

⁸ *Comparet v. Burr*, 5 Blackf. (Ind.) 419 (1840); *Griswold v. Judd*, 1 Root (Conn.), 221 (1790).

⁹ *Payne v. Elliott*, 54 Cal. 339 (1880).

¹⁰ *Fullam v. Cummings*, 16 Vt. 697 (1844).

¹¹ *Sampson v. Hammond*, 4 Cal. 184 (1854); *Nelson v. Burt*, 15 Mass. 204 (1818). In *Platner v. Johnson*, 26 Miss. 142 (1853), the court held that trover would not lie, because the severance and asportation were one transaction.

¹² *Drew v. Spaulding*, 45 N. H. 472 (1864).

¹³ *Amory v. Flyn*, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316 (1813).

¹⁴ *Taber v. Jenny*, 1 Sprague (U. S. Adm. Dec.) 315 (1856).

¹⁵ *Averill v. Chadwick*, 153 Mass. 171, 26 N. E. 441 (1891).

¹⁶ *Spalding v. Preston*, 21 Vt. 9, 14, 50 Am. Dec. 68 (1848).

¹⁷ *Buxton v. Hughes*, 2 Bing. 173 (1824); *Smith v. James*, 7 Cow. (N. Y.) 328 (1827); *National Surety Co. v. United States*, 129 Fed. 70 (1904); *The Beaconsfield*, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. Ed. 993 (1894).

¹⁸ *Kehr v. Hall*, 117 Ind. 405, 20 N. E. 279 (1888).

¹⁹ *Wheeler v. Lawson*, 103 N. Y. 40, 8 N. E. 360 (1886); *Cook v. Thornton*, 109 Al. 523, 20 So. 14 (1895).

owner,²⁰ he can successfully maintain the action.^{20a} In such cases, the defendant does not make out a defense, as a rule, by showing that the true ownership is in a third person. He must go further and connect himself with such title.²¹

When the plaintiff is not in possession at the time of the defendant's conversion, he must show property in himself and his right to immediate possession. In such cases, it is proper to say that he must recover upon the strength of his legal right and not upon the defects in the defendant's title.²²

420. How Conversion Is Committed. The tort of conversion ordinarily assumes one of four forms:²³ (1) A wrongful taking under a claim of ownership, or a claim inconsistent with the plaintiff's ownership. (2) An exclusion of the plaintiff from his rightful exercise of dominion, although the defendant's taking was lawful. (3) A wrongful use of the property. (4) Its wrongful detention. Let us consider these in detail:—

421. Wrongful Asportation in the Exercise of Dominion. If the asportation, or wrongful taking, is not of a character inconsistent with the plaintiff's ownership, it may be trespass, but it does not amount to conversion.

Accordingly, a person who removes the goods of another, for his own convenience, and does not restore them to their original position, may be liable in trespass, but not in conversion, for he makes no claim to their ownership or possession; he does no act which amounts to an exercise of ownership or right of property in-

20. Disselsin of Chattels, by Professor Ames, 3 Harv. L. R. 23, 313, 337 (1889). **102** (1859); Jeffries v. Great Western Ry., 5 E. & B. 802, 25 L. J. Q. B. 107 (1856).

20a. National Surety Co. v. U. S., 129 Fed. 70, 63 C. C. A. 512 (1904), "a bailee for hire of services may maintain an action of trespass, trover, or conversion for the disturbance of his possession by a wrongdoer, and may recover the value of the property as damages;" The Winkfield (1902), P. 42, 71 L. J. P. 21. **22.** Union Stockyard Co. v. Malory, 157 Ill. 554, 41 N. E. 888, 48 Am. St. R. 341 (1895).

23. Kennet v. Robinson, 2 J. J. Marsh. (25 Ky.) 84 (1829); Fernald v. Chase, 37 Me. 289 (1853); State v. Haley, 2 Hask. (U. S. Cir. Ct.) 354, Fed. Cases No. 8,977 (1879); Glover v. Riddick, 11 Ired. (33 N. C.) 582 (1850); Harris v. Saunders, 2 Strob. Eq. (S. C.) 370 (1848).

21. Stowell v. Otis, 71 N. Y. 36 (1866); Cook v. Patterson, 35 Al.

426. Nonfeasance, or Negligent Omission. If the deterioration or destruction of the article, however, is due to the mere nonfeasance of the defendant, he can successfully defend against an action of conversion, although he may be liable in an action for negligence.⁴⁴ For example, a warehouseman, or common carrier fails to guard properly articles which have been confided to him, and they become worthless,⁴⁵ or are lost or stolen,⁴⁶ he is not liable in trover, although he may be answerable either for a breach of his contract, or of his common law duty, to keep safely. "Conversion," it is said, "upon which recovery in trover may be had, must be a positive, tortious act. Nonfeasance or neglect of duty, mere failure to perform an act obligatory by contract, or by which property is lost to the owner will not support the action."⁴⁷

When, however, the property is rendered worthless, or its nature is changed, or it is lost or destroyed as the proximate result of the defendant's act, or misfeasance, trover may be maintained, even though the defendant is a bailee,⁴⁸ or an agent.⁴⁹

v. Philip Best Co., 45 Wis. 262 N. C. 849, 32 E. C. L. R. 389 (1837); (1878); Richardson v. Atkinson, 1 Bowlin v. Nye, 10 Cush. (64 Mass.) Strange, 576 (1723); Dench v. 416 (1852); Scovill v. Griffith, 12 N. Walker, 14 Mass. 500 (1780); Sanderson v. Haverstick, 8 Pa. 294 S. Co., 168 N. Y. 533, 61 N. E. 896, (1848). In Byrne v. Stout, 15 Ill. 85 Am. St. R. 699 (1901); Louisville, etc., Ry. v. Campbell, 7 Heisk. (54 Tenn.) 253 (1872).
not amount to conversion. Cf. Simmons v. Lillystone, 8 Exch. 431, 22 L. J. Exch. 217 (1853), cutting a spar.

44. Central, etc., Co. v. Lampley, 76 Al. 357, 52 Am. R. 334 (1884); Thompson v. Moesta, 27 Mich. 182 (1873); Salt Springs Bank v. Wheeler, 48 N. Y. 492, 8 Am. R. 504 (1872); Tinker v. Morrill, 39 Vt. 477, 94 Am. Dec. 345 (1866).

45. Mulgrave v. Ogden, Croke Eliz. 219 (1591); Emory v. Jenkinson, Tappan (O.), 219 (1818); Jones v. Allen, 1 Head (38 Tenn.), 626 (1858).

46. Ross v. Johnson, 5 Burr. 2825 (1772); Williams v. Gesse, 3 Bing.

47. Davis & Son v. Hurt, 114 Al. 146, 21 So. 468 (1896); Smith v. Archer, 53 Ill. 241 (1870); Savage v. Smythe & Co., 48 Ga. 562 (1873).

48. Munford v. Taylor, 2 Met. (59 Ky.) 599 (1859); Hay v. Conner, 2 Har. & J. (Md.) 347 (1808); Worth v. McDuffie, 48 N. H. 402 (1869); Hawkins v. Hoffman, 6 Hill (N. Y.), 586, 41 Am. Dec. 768 (1844); Weakley v. Pearce, 5 Heisk. (52 Tenn.) 401 (1871); Ry. Co. v. O'Donnell, 49 O. St. 489, 32 N. E. 476, 34 Am. St. R. 579 (1892); Marshall, etc., Co. v. Kansas, etc., Ry., 176 Mo. 480, 75 S. W. 638, 98 Am. St. R. 508 (1903).

49. Donahue v. Shippee, 15 R. I.

consistent with the real owner's right of possession.²⁴ If, however, he removes them to a place to which ~~he refuses the owner access,~~²⁵ or does any other act in exclusion or defiance of the owner's right; makes any assumption of property and of the right of disposition, or intermeddles in a way which indicates a claim of ownership; or makes any assertion of the control which belongs to the owner, his conduct may be treated as amounting to a conversion.²⁶

did not
thence
act.

422. Intention to convert unless followed by some act which amounts to an exclusion of the owner from his exercise of dominion over the goods, is not a conversion.²⁷ Accordingly, a threat, by one not in possession of goods, to resist their removal by the owner, may be actionable as slander of title, but not as conversion.²⁸ The same is true of a pretended purchase or sale of goods, by one who neither takes nor delivers possession of them.²⁹ If, however, the goods are in the defendant's possession, his refusal to allow the plaintiff to remove them may constitute a conversion.³⁰

24. *Bushel v. Miller*, 1 Strange (S. C.) 318 (1845). In this case, 128 (1718); *Fouldes v. Willoughby*, the defendant permitted plaintiff's 8 M. & W. 540, 5 Jur. 534 (1841). slave, who represented himself to be a free mulatto, to travel with The defendant put plaintiff's horses off his steamboat, because of the plaintiff's misconduct, though not with any view to appropriating them to his own use or to deprive defendant of them, but to get rid of him. *Shea v. Milford*, 145 Mass. 525, 14 N. E. 769 (1888). Defendant's officers requested plaintiff to remove his property from the parcel of land where they were stored; and upon his refusal to do so, removed it to another parcel. Nothing was done in derogation of plaintiff's dominion. *Mattice v. Brinkham*, 74 Mich. 705, 42 N. W. 172 (1889). Articles were removed from one room to another; *Sparks v. Purdy*, 11 Mo. 219 (1847), similar to preceding case.

27. *England v. Cowley*, L. R. 8 Ex. 126, 42 L. J. Ex. 80 (1873); *Penny v. State*, 88 Al. 105, 7 So. 50 (1889); *Herron v. Hughes*, 25 Cal. 555 (1864); *Irish v. Cloyes*, 8 Vt. 30 (1836).

28. *Boobier v. Boobier*, 39 Me. 406 (1855); *Polley v. Lenox Iron Works*, 2 Allen (84 Mass.), 182, 184 (1861); *Platner v. Johnson*, 26 Miss. 142, 143 (1853).

29. *Traylor v. Horrall*, 4 Blackf. (Ind.) 317 (1837); *Fuller v. Tabor*, 39 Me. 519 (1855); *Burnside v. Twichell*, 43 N. H. 390 (1861).

30. *Badger v. Batavia, etc., Co.*, 70 Ill. 302 (1873); *Contra, Town v. Hazen*, 51 N. H. 596 (1872). In

25. *Fosdick v. Collins*, 1 Stark, 173 (1816).

26. *Nelson v. Whetmore*, 1 Rich. Thorogood v. Robinson, 6 Q. B. R.

423. Conversion Without Physical Taking. The asportation necessary to constitute a conversion, where the tort is founded upon a wrongful taking, need not be actual; it may be constructive. A person, who wrongfully transfers a bill of lading or a warehouse receipt, and thereby enables a third person to get the goods to the exclusion of the owner, is liable as for an asportation.³¹ So, too, is the one receiving such a document of title and claiming the property under it.³² And, of course, a buyer of chattels, which are in his presence, is guilty of asportation, when he asserts that they are his and repudiates the owner's title and possession, although he does not touch them.³³ Moreover, a taking by an agent, for which the principal is legally responsible, is his taking.³⁴ Again, one who shuts up his neighbor's trespassing fowls and refuses to turn them loose;³⁵ a lessor, who insists that articles belonging to a lessee are his own, and forbids the lessee from taking them,³⁶ and a public official who unlawfully prevents the owner from taking his property from a warehouse,³⁷ is guilty of their asportation. So is a sheriff, constable or marshal, who levies upon goods without lawful right, although he does not actually touch them. It is enough that he "assumes such a control over the property, by a possession actual or constructive, as deprives the owner of his dominion over them for any purpose."³⁸ If, however, he does not assume their custody or control, but contents himself with assert-

769, 14 L. J. Q. B. 87 (1845), a verdict for defendant was sustained, chiefly on the ground that plaintiff did not send some one with proper authority to demand and receive the goods.

31. *Hort v. Bott*, L. R. 9 Ex. 86, 43 L. J. Ex. 81 (1874).

32. *McCombie v. Davies*, 6 East. 538, 8 R. R. 534 (1805).

33. *Chamberlin v. Shaw*, 18 Pick. (36 Mass.) 278 (1836). The same doctrine was applied to a land owner, who refused to permit a mortgagee to take a boiler from his premises. *Badger v. Batavia, etc., Co.*, 70 Ill. 302 (1873).

34. *Keyworth v. Hill*, 3 B. & Ald. 685 (1820). Taking was by the wife, and husband held liable with the wife; *Chambers v. Lewis*, 28 N. Y. 454 (1863).

35. *Leonard v. Belknap*, 47 Vt. 602 (1874).

36. *Vilas v. Mason*, 25 Wis. 310 (1870).

37. *Bristol v. Burt*, 7 Johns. (N. Y.) 254 (1810).

38. *Johnson v. Farr*, 60 N. H. 426 (1880); *Abercrombie v. Bradford*, 16 Al. 560 (1849); *Stuart v. Phelps*, 39 Ia. 14 (1874); *Wintringham v. Laffoy*, 7 Cow. (N. Y.) 735 (1827).

ing his intention to do so in the future, he is not liable for conversion.³⁹

424. Goods Obtained by Fraud. Even though the owner of goods voluntarily delivers them to another, the latter is guilty of a wrongful taking, if he obtains them by such a fraud as justifies the owner in avoiding the sale, or other transaction, to which his assent was obtained.⁴⁰ Upon its avoidance, the owner may insist that no title or right of possession ever passed to the defrauder. Of course if the owner does not avoid the transaction, until after the goods have been transferred to a *bona fide* purchaser, he cannot proceed against the latter for conversion.⁴¹ Nor, according to the better authorities, can he maintain conversion against an innocent transferee of such defrauder, although not one for value, without demand and refusal.⁴²

425. Excluding the Rightful Owner, or Possessor. The most frequent examples of this form of conversion are afforded by the destruction, or sale of personal property.

It is not necessary to show that the defendant actually converted to his own use the property of the plaintiff, nor that he derived any benefit therefrom. It is enough that, by an intended act, he deprived the plaintiff of the property. Accordingly, one commits conversion by killing animals, or burning up property, or melting ice, or cancelling a certificate, or by so dealing with a chattel that its identity is destroyed.⁴³

³⁹. *Mallalieu v. Laughner*, 3 C. & 477 (1839); *Mowrey v. Walsh*, 8 P. 551 (1828); *Herron v. Hughes*, 25 Cow. (N. Y.) 238 (1828).

Cal. 555 (1864); *Fernald v. Chase*, 37 Me. 289 (1853). ⁴². *Goodwin v. Wertheimer*, 99 N. Y. 149, 1 N. E. 404 (1885); but

⁴⁰. *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 141 (1844); *Lovell* see *Farley v. Lincoln*, 51 N. H. 577 (1872).

v. Hammond, 66 Conn. 500, 34 At. 511 (1895); *Holland v. Bishop*, 60 Minn. 23, 61 N. W. 681 (1895); *Thurston v. Blanchard*, 22 Pick. (40 Mass.) 18, 33 Am. Dec. 700 (1839); *Baird v. Howard*, 51 O. St. 57, 36 N. E. 732, 46 Am. St. R. 550, 22 L. R. A. 846 (1894). ⁴³. *Keyworth v. Hill*, 3 B. & Ald. 685 (1820), opinion of Abbott, C. J.; *Atchison, etc., Ry. v. Tanner*, 19 Col. 559, 36 Pac. 541 (1894), seventh count for destruction of grass; *Frost v. Plumb*, 40 Conn. 111, 16 Am. R. 18 (1873); *Olds v. Chicago Open Board of Trade*, 33 Ill. App. 445 (1889); *Simmons v. Sikes*, 2 Ire. (24 N. C.) 98 (1841); *Ascherman*

⁴¹. *Trott v. Warren*, 11 Me. 227 (1824); *Bradley v. Obeare*, 10 N. H.

427. Sale of Property, as a Conversion. A person, who engages in selling and delivering property, thereby asserts ownership, either in himself, or in the person for whom he professes to act. If the ownership is in another, the act of selling is a distinct repudiation of that other's dominion, and an exclusion of him from possession. It is, therefore, actionable conversion, no matter whether the seller believed the property to be his or not. In attempting to transfer the ownership he acted at his peril.⁵⁰

The same rule applies to an auctioneer, broker or other agent, when he sells and delivers property for a principal who is not its owner and has no legal authority to dispose of it.⁵¹ Wrongful intent is not an essential element of the tort of conversion in such cases. Its gist is the rightful owner's deprivation of his property, by some unauthorized act of another asserting dominion or control over it.⁵²

428. Purchaser Is Also Liable for Conversion. As one, who buys and receives possession of property, does thereby assert dominion over it, to the exclusion of everyone else, his act of purchasing and taking possession amounts to conversion, as against the true owner. His good faith in the transaction does not save him,⁵³

543, 8 At. 541 (1887); plaintiff's (1875); Consolidated Co. v. Curtis, grass was cut by defendant, while (1892), 1 Q. B. 495, 61 L. J. Q. B. working for a third person. 325; Swim v. Wilson, 90 Cal. 126,

50. Hutchins v. King, 1 Wall. (68 27 Pac. 33, 13 L. R. A. 605, 25 Am. U. S.) 53, 17 L. Ed. 544 (1863); May St. R. 110 (1891); Kimball v. Bill- v. O'Neal, 125 Al. 620, 28 So. 12 ings, 55 Me. 147, 92 Am. Dec. 581 (1899); Merchants Bank v. Meyer, (1867); Robinson v. Bird, 158 Mass. 56 Ark. 499, 20 S. W. 406 (1892); 357, 33 N. E. 391, 35 Am. St. R. 495 Horton v. Jack, 126 Cal. 521, 58 Pac. (1893); Bercich v. Marye, 9 Nev. 312 1051 (1899); Brown v. Campbell Co., (1874); contra, Frizzell v. Rundle, 44 Ks. 237, 24 Pac. 492 (1890); La- 88 Tenn. 396, 12 S. W. 918, 17 Am. feyth v. Emporia Bank, 53 Ks. 51, St. R. 998 (1890).

35 Pac. 805 (1894); Gore v. Izer, 64 52. Boyce v. Brockway, 31 N. Y. Neb. 843, 90 N. W. 758 (1902); Pease 490 (1865); Reid v. Colcock, 1 Nott v. Smith, 61 N. Y. 477 (1875); Croft & McCord (S. C.), 592 (1819). v. Jennings, 173 Pa. 216, 33 At. 1026 53. Cooper v. Willomatt, 1 C. B. (1896); Morrill v. Moulton, 40 Vt. 672, 14 L. J. C. P. 219, 50 E. C. L. R. 242 (1867). 672 (1845); Scott v. Hodges, 62 Al.

51. Stephens v. Elwall, 4 M. & S. 337 (1878); Sims v. James, 62 Ga. 259 (1815); Hollins v. Fowler, L. 260 (1879); Gilmore v. Newton, 9 R. 7 H. L. 757, 44 L. J. Q. B. 169 Allen (91 Mass.), 171, 85 Am. Dec.

and, in most jurisdictions, it does not entitle him even to a demand for the property from the true owner, before a suit in trover can be brought.⁵⁴ Even in jurisdictions, where an innocent purchaser from a wrongful holder is entitled to a demand; he forfeits that right by selling the property. Until the sale, it is said, his mere possession is not inconsistent with the plaintiff's ownership, but the sale estops him from denying that he was dealing with it adversely to the plaintiff.⁵⁵

The pledgee or mortgagee of personal property, who asserts a right to it, in defiance of the claim of the true owner, is guilty of converting it.⁵⁶

429. Wrongful Use of Property as a Conversion. Perhaps the most common example of this form of conversion is afforded by the bailee who deals with property, of which he has lawful possession, in a manner inconsistent with the purposes of the bailment. Some instances of this class have been given, under previous headings, such as destruction⁵⁷ and loss,⁵⁸ due to the culpable acts of the hirers of property or of carriers.

Other examples are afforded by the bailees of various descriptions, who sell or pledge property without authority therefor from their bailors;⁵⁹ or who, having it lawfully in their possession for

749 (1864); *Trudo v. Anderson*, 10 Mich. 357 (1862); *Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 508 (1843); *Stan-
Velzian v. Lewis*, 15 Or. 539, 16 Pac. 631, 3 Am. St. R. 184 (1888); *Carey
v. Bright*, 58 Pa. 70 (1868); *Riford
v. Montgomery*, 7 Vt. 411 (1835). *Buchanan Co. v. Baskett*, 14 Bush.
(77 Ky.) 658 (1879); *Hotchkiss v.
Hunt*, 49 Me. 213, 224 (1860); *Stan-
ley v. Gaylord*, 1 Cush. (55 Mass.)
536, 48 Am. Dec. 643 (1848); *Thrall
v. Lathrop*, 30 Vt. 307, 73 Am. Dec.
306 (1858).

⁵⁴. In N. Y., it is held that "an innocent purchaser of personal property from a wrongdoer shall first be informed of the defect in his title, and have an opportunity to deliver the property to the true owner, before he shall be liable as a tortfeasor for a wrongful conversion." *Gillett v. Roberts*, 57 N. Y. 28, 34 (1874). ⁵⁷. *Frost v. Plumb*, 40 Conn. 111, 16 Am. R. 19 (1873). ⁵⁸. *Marshall, etc., Co. v. Kansas, etc., Ry.*, 176 Mo. 480, 75 S. W. 638, 98 Am. St. R. 508 (1903). Accord, *Youl v. Harbottle*, 1 Peake, 49 (1791); *Devereaux v. Barclay*, 2 B. & Ald. 702, 21 R. R. 457 (1819).

⁵⁵. *Pease v. Smith*, 61 N. Y. 477 (1875). ⁵⁹. *Powell v. Sadler*, Paley, Prin. & Agent (3d Ed.), 80 (1806); *Mulliner v. Florence*, 3 Q. B. D. 484, 47 L. J. Q. B. 700 (1878); *Hooks v.*

⁵⁶. *McCombie v. Davies*, 6 East. 538, 8 R. R. 534 (1805); *Newcomb-*

one purpose, use it for a different⁶⁰ and unjustifiable⁶¹ purpose. In cases of this class, the bailee, having converted the property, becomes liable for its value, without regard to the degree of care which he may have taken of it, and regardless also of the immediate cause of its injury or destruction.⁶² He may be liable, too, although an infant and thus in a position to defend successfully an action for breach of his contract as bailee,⁶³ or, although the contract of bailment was made on Sunday, and, therefore, invalid.⁶⁴ In the case of an infant bailee, it is generally held that any willful and positive act on his part, in violation of the bailment, amounts to an election on his part to disaffirm the contract, and constitutes him, thereafter, a converter of the property.⁶⁵

430. Conversion of Principal's Property by Agent. An agent is guilty of conversion, as against his principal, when he sells or exchanges the latter's property without authority,⁶⁶ or applies its proceeds to an unauthorized purpose,⁶⁷ or refuses to return it or its proceeds upon a seasonable demand.⁶⁸

land v. Read, 11 Allen (93 Mass.), Wis. 603 (1875); DeVoin v. Mich. 231 (1865). Lumber Co., 64 Wis. 616, 54 Am. R.

^{60.} Welch v. Mohr, 93 Cal. 371, 28 649, 25 N. W. 552 (1885).

Pac. 1060 (1892); Wheelock v. ^{63.} Homer v. Thwing, 3 Pick. (20 Wheelright, 5 Mass. 104 (1809); Mass.) 492 (1826); Freeman v. Bo- Disbrow v. Tenbroeck, 4 E. D. land, 14 R. I. 39, 51 Am. R. 340 Smith (N. Y.), 397 (1855); Wood- (1882); Towne v. Wiley, 23 Vt. 355, man v. Hubbard, 25 N. H. 67, 57 Am. 56 Am. Dec. 85 (1854).

Dec. 310 (1852); Hart v. Skinner, ^{64.} Frost v. Plumb, 40 Conn. 111, 16 Vt. 138, 42 Am. Dec. 500 (1844). 16 Am. R. 18 (1873); Hall v. Cor-

^{61.} Doolittle v. Shaw, 92 Ia. 348, coran, 107 Mass. 251, 9 Am. R. 30 60 N. W. 621, 26 L. R. A. 366 and (1871).

note, 54 Am. St. R. 562 (1894); ^{65.} Campbell v. Stakes, 2 Wend. Spooner v. Manchester, 133 Mass. (N. Y.) 137, 19 Am. Dec. 561 (1828); Wentworth v. McDuffie, 48 N. H. 402 (1869).

^{66.} Haas v. Damon, 9 Ia. 589 (1859); Etter v. Bailey, 8 Pa. 442 (1848).

^{62.} Ledbetter v. Thomas, 130 Al. ^{67.} McNear v. Atwood, 17 Me. 434 299, 30 So. 342 (1901); Malone v. (1840); Murray v. Burling, 10 Robinson, 77 Ga. 719 (1886); Mur- Johns. (N. Y.) 172 (1813); Laverty phy v. Kaufman, 20 La. Ann. 559 v. Snethen, 68 N. Y. 522, 23 Am. R. (1868); Fisher v. Kyle, 27 Mich. 454 184 (1877); Cotton v. Sharpstein. 14 (1875); Perham v. Coney, 117 Mass. Wis. 226, 80 Am. Dec. 774 (1861).

102 (1875); Lane v. Cameron, 38 ^{68.} Britton v. Ferrin, 171 N. Y. 235,

If the agent's default, however, consists in a simple omission to act,⁶⁹ or in a mere breach of duty, as in selling goods (which he is authorized to sell) for a lower price than that named by his principal, or on different terms,⁷⁰ or, as, in using railroad bonds, in effecting a reorganization, without following all the directions of the principal,⁷¹ he is not guilty of conversion.

431. Asportation or Detention by a Mere Custodier. The courts, both in England and in this country, are disposed to treat the acts of agents, servants and bailees as not amounting to conversion, when they are limited to the mere custody or transportation of property, and are done without any intention of interfering with the title of the true owner, or of antagonizing his dominion. The difficulty lies, in fixing the limits of this exception to the general rule of liability, for wrongful intermeddling with another's property.

Perhaps the following statement fairly expresses the prevailing view upon this topic: The reception of property by delivery from one, whom the receiver is justly entitled to regard as its owner, and its return to him, or delivery over to a third person upon his order, without notice of an adverse claim in another, and without reference to the question of ownership of the property, are not tortious acts.⁷²

Accordingly, it has been held that if a bailee have the temporary possession of property, holding the same as the property of the bailor and asserting no title in himself, and in good faith restores the property to the bailor, before he is notified that the true owner will look to him for it, no action will lie against him, for he has only done what it was his duty to do.⁷³

63 N. E. 954 (1902); *Mullen v. J. J.* 170 N. Y. 233, 63 N. E. 285 (1902). *Quinlan Co.*, 195 N. Y. 109, 87 N. E. See dissenting opinion.

1078, 24 L. R. A. N. S. 511 (1909). 72. *Burditt v. Hunt*, 25 Me. 419,

69. *McMorris v. Simpson*, 21 43 Am. Dec. 289 (1845); *Greenway Wend. (N. Y.)* 610, 614 (1839). v. *Fisher*, 1 C. & P. 190 (1824);

70. *Loveless v. Fowler*, 79 Ga. 134, Brett, J., in *Fowler v. Hollins*, L. R. 11 Am. St. R. 407, 4 S. E. 103 (1887); 7 Q. B. at p. 630 (1872); *Frome v. Sarjeant v. Blunt*, 16 Johns. (N. Y.) Dennis, 45 N. J. L. 515 (1883).

74 (1819). 73. *Nelson v. Iverson*, 17 Al. 216

71. *Indust. & Gen. Trust v. Tod*, (1850); *Hill v. Hayes*, 38 Conn. 532

432. Some courts have gone further, and have held, that the bailee of goods, known by him to have been stolen by the bailor, is not liable for conversion to the true owner for taking custody and delivering them back to the thief.⁷⁴ They have also held that the mortgagee⁷⁵ or pledgee⁷⁶ is not guilty of conversion, when he does not assume to hold the property adversely to the true owner. It is difficult to see, however, why the very act of taking possession as mortgagee or pledgee is not a repudiation of the true owner's dominion. In a recent Minnesota case,⁷⁷ the court enunciated the following rule: "An agent or servant, who, acting solely for his principal or master, and by his direction, and without knowing of any wrong, or being guilty of gross negligence in not knowing it, disposes of or assists the master in disposing of property which the latter has no right to dispose of, is not thereby rendered liable for a conversion of the property." The same court, however, has shown a tendency to limit the doctrine thus announced, and has refused to apply it to a commission merchant, who receives warehouse receipts from his debtor, and applies the grain to the payment of the debt, believing that the grain belongs to the debtor, while in fact it is the property of another.⁷⁸

It is clear, too, that the doctrine is not to be applied, when the agent or servant takes an active, though *bona fide*, part with his master, or principal, in actually converting the property.⁷⁹

- (1871); *Parker v. Lombard*, 100 Mass. 405 (1868); *Hodgson v. St. Paul Plow Co.*, 78 Minn. 172, 80 N. W. 956, 50 L. R. A. 644, with valuable note (1899); *Nanson v. Jacob*, 93 Mo. 331, 6 S. W. 246, 3 Am. St. R. 531 (1887); *Walker v. First Nat. Bank*, 43 Or. 102, 72 Pac. 635 (1903). In *Hudmon v. DuBose*, 85 Al. 446, 5 So. 162, 2 L. R. A. 475 (1888), constructive notice, by the registration of a chattel mortgage, was held sufficient to make the bailee's act of delivery a conversion; *Shellnut v. Central of Ga. Ry.*, 131 Ga. 404, 407, 62 S. E. 294, 18 L. R. A., N. S. 494 (1908).
74. *Loring v. Mulcahy*, 3 Allen (85 Mass.), 575 (1862).
 75. *Leonard v. Tidd*, 3 Met. (44 Mass.) 6 (1841); *Spackman v. Foster*, 11 Q. B. D. 99, 52 L. J. Q. B. 418 (1883).
 76. *Leuthold v. Fairchild*, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218 (1886).
 77. *Ibid.*
 78. *Doliff v. Robins*, 83 Minn. 498, 86 N. W. 772, 85 Am. St. R. 466 (1901).
 79. *Miller v. Wilson*, 98 Ga. 567, 25 S. E. 578 (1896); *Shearer v. Evans*, 89 Ind. 400 (1883); *Wardner-Bushnell Co. v. Harris*, 81 Ia. 153.

433. Conversion by a Finder. In dealing with the topic just discussed, a learned English judge⁸⁰ said: "I cannot find it anywhere distinctly laid down, but I submit to your lordships that, on principle, one who deals with goods, at the request of a person who has the actual custody of them, in the *bona fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does, if the act is of such a nature as would be executed if done by the authority of the person in possession, if he was the finder of goods, or intrusted with their custody."

Just what a finder may do with goods which he takes into his possession without being guilty of conversion, may not be clearly settled.^{80a} Certainly he is not liable for conversion, when the property becomes worthless, or is lost, by reason of his nonfeasance,⁸¹ although he may be liable in some other form of action for the proximate consequences of his gross negligence.⁸² It is also clear, that if he abuses the property,⁸³ or takes upon himself its delivery to some third person who is not entitled to it,⁸⁴ his act amounts to a conversion. But, is it a conversion for him, after taking the property into his possession, to place it back where he found it, provided this act of dispossession subjects it to no greater peril than it was in, when he found it? N.

434. Undoubtedly there are dicta to the effect that, though a finder is not bound to take possession, if he does, he is bound to keep

46 N. W. 859 (1890); D. M. Osborne Co. v. Piano Mfg. Co., 51 Neb. 502, (1772).

70 N. W. 1124 (1897).

80. Blackburn, L. J., in Hollins v. Smith (N. Y.) 359 (1852).

Fowler, L. R. 7 H. L. 757 (1875).

80a. Kuykendall v. Fisher, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A., N. S. 94 (1906), contains a full review of the authorities as to the finder's right of possession, but not of the use of the article.

81. Mulgrave v. Ogden, Croke Eliz. 219, Owen 141 (1591); Nelson v. Merriam, 4 Pick. (21 Mass.) 249 (1826).

82. Ross v. Johnson, 5 Burr. 2825

83. Murgoo v. Cogswell, 1 E. D.

Smith (N. Y.) 359 (1852).

84. Coke, J., in Isaack v. Clark, 2

Bulstrode 306 (1615). In this case finding alleged was a fiction of the pleader, and it is not clear whether Lord Coke's dictum was intended to apply to the case of actual finding,

or to the fictitious finding, in the case then before the court.

safely for the true owner, and to make reasonable effort to discover him; that, after taking possession, there is no *locus penitentiae*.⁸⁵ This, it is submitted, tends to deter finders from taking temporary possession of property, the quality of which is not apparent at a glance, and is opposed to the weight of authority.⁸⁶ The Supreme Court of Massachusetts has held that one, who takes up a horse going at large in the highway, does not convert it by turning it back again into the highway;⁸⁷ and the Supreme Court of Tennessee has declared that one, who finds in his pasture the cow of another, ought to turn her out and let her find her owner.⁸⁸

435. Conversion by Unlawful Detention. Not every wrongful detention of goods amounts to a conversion. If a person is bailee of an article, he may be bound by the terms of the bailment to return it to the bailor. Still, his mere failure to return it at the end of the bailment period is a breach of contract, not a tort. Nor can his contract liability be turned into conversion, by a demand from the bailor, that he return the article, and by his refusal to comply with the demand.⁸⁹ Such refusal does not amount to an assertion of

^{85.} *Sovern v. Yoran*, 16 Or. 269, 20 Pac. 100, 8 Am. St. R. 293 (1888); *Smith v. Nashua & L. Ry.*, 27 N. H. 86, 90, 59 Am. Dec. 364 (1853).

^{86.} *Dougherty v. Posegate*, 3 Ia. 88 (1856). In this case, defendant's legal advisers had told him to put the money, which he had found, back where he found it. The court does not intimate that this was unsound advice, and the liability of the defendant, the jury were instructed, depended upon whether he had been guilty of gross negligence. Cf. analogous cases, *Roulston v. McClelland*, 2 E. D. Smith (N. Y.) 60 (1853); *Griswold v. Boston & M. Ry.*, 183 Mass. 434, 67 N. E. 354 (1903); *Doxtator v. Chic. & M. Ry.*, 120 Mich. 596, 79 N. W. 922 (1899); *Dyche v. Vicksburg, etc., Ry.*, 79 Miss. 361, 30 So. 711 (1901).

^{87.} *Wilson v. McLaughlin*, 107 Mass. 587 (1871). It is true, the court says, that the defendant's act, in turning the horse into the highway, was due to the refusal of his employer to let the horse remain on his land. But, if the law imposes upon the finder the positive duty of keeping the article, this command of the master to violate the defendant's legal duty would not avail him. He would be bound to take the horse off from his employer's premises, but he could have kept the animal in some other place.

^{88.} *Medlin v. Balch*, 102 Tenn. 710, 52 S. W. 140 (1899).

^{89.} *Fifield v. Maine Co.*, 62 Me. 77 (1873); *Bassett v. Bassett*, 112 Mass. 99 (1873); *Farrar v. Rollins*, 37 Vt. 295 (1864).

dominion over the article. If the demand is for its surrender however, and the bailee refuses to comply therewith, this is evidence of conversion.⁹⁰ "For what is conversion," said Lord Holt, "but an assuming upon one's self the property and right of disposing of another man's goods, and he that takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them."⁹¹

436. Unconditional Refusal. In order to make out a case of conversion by demand and refusal, where there is no evidence of unlawful taking or use, the refusal must be unqualified,⁹² or the qualification must have been made in bad faith, or upon a legally untenable ground.⁹³ Moreover, when one ground has been assigned by the defendant for his refusal, and suit is brought for conversion, he cannot justify by evidence that he had a legally tenable ground for refusal. Such ground was waived by his choosing to stand upon another ground.⁹⁴

437. Qualified Refusal. When there has been neither wrongful taking nor use of the property by the defendant, and it is demanded from him by one whose right to demand and receive it is not known to him, he may safely refuse to surrender, until he has had a fair opportunity to clear up his doubts on the subject. Such a refusal is a qualified one, and if made in good faith and upon reasonable grounds, it does not constitute a case of conver-

⁹⁰. *Dent v. Chiles*, 5 Stew. & P. Moore v. Fitzpatrick, 7 Baxt. (66 (Al.) 383, 23 Am. Dec. 350 (1832); Tenn.) 350 (1874); *Nay v. Crook*, 1 Dame v. Dame, 38 N. H. 429, 75 Am. Pln. (Wis.) 546 (1845).

⁹¹. *Wykoff v. Stevenson*, 46 N. J. L. 326 (1884); *McCor-* ⁹². *Borroughs v. Bayne*, 5 H. & N. 296, 29 L. J. Ex. 188 (1860); *Briggs* *mick v. Penn. Ry.*, 49 N. Y. 303 v. Haycock, 63 Cal. 343 (1883); (1872); S. C. 99 N. Y. 65, 52 Am. R. *Jonsson v. Lindstrom*, 114 Ind. 152, 6 (1885); *Claffin v. Gurney*, 17 R. I. 16 N. E. 400 (1888); *Williams v.* 185, 20 At. 932 (1890); *Sibley v. Smith*, 153 Pa. 463, 25 At. 1122 (1893); *Roberts v. Yarboro*, 41 Tex. Story, 8 Vt. 15 (1836).

⁹³. *Baldwin v. Cole*, 6 Mod. 212 449 (1874).
(1704); *Davies v. Nicholas*, 7 C. & ⁹⁴. *Boadrman v. Sill*, 1 Camp. 410 P. 339 (1836), accord. (1809); *Marine Bank v. Fiske*, 71

⁹². *Rushworth v. Taylor*, 3 Q. B. N. Y. 353 (1877); *Singer Mfg. Co.* 699, 12 L. J. Q. B. 80 (1842); *Mc-* v. King, 14 R. I. 511 (1884); 24 Am. *Lain v. Huffman*, 30 Ark. 428 (1875); L. Reg., N. S. 51 (1885).

sion.⁹⁵ Whether the defendant has acted reasonably, either in assigning the qualification, or in the time taken for resolving his doubts, is a question of fact, and, whenever different inferences may be drawn from the evidence, is for the jury.⁹⁶

The doctrine, which we have been considering, is most frequently invoked in behalf of a common carrier or other bailee. When a demand is made upon him for the goods, by another than the bailor, or some one claiming under him, the bailee is not bound to act upon the instant, but is entitled to a reasonable time for investigation; and, during such period, his detention of the property is not a conversion.⁹⁷ As soon, however, as he becomes satisfied, or had he acted reasonably, would have become satisfied, that the claimant is entitled to the possession of the property, he should surrender it.^{97a} Such a surrender is justifiable even against his bailor.⁹⁸ If he cannot decide upon the merits of the adverse claim-

95. *Green v. Dunn*, 3 Campb. 215 607 (1840); *Smith v. Durham*, 127 (1811); *Alexander v. Southey*, 5 B. N. C. 417, 37 S. E. 473 (1900).

& Ald. 247, 24 R. R. 348 (1821); *Zachary v. Pace*, 9 Ark. 212, 47 Am. Dec. 744 (1848); *Witherspoon v. Blewett*, 47 Miss. 570 (1873); *Robinson v. Burleigh*, 5 N. H. 225 (1830); *Mount v. Derrick*, 5 Hill (N. Y.) 455 (1843); *Ball v. Liney*, 48 N. Y. 6, 8 Am. R. 511 (1871); *Blankenship v. Berry*, 28 Tex. 448.

96. *Vaughan v. Watt*, 6 M. & W. 492 (1840); *Pillott v. Wilkinson*, 3 H. & C. 345, 34 L. J. Ex. 22 (1864); *Ingalls v. Bulkley*, 15 Ill. 224 (1853); *Entee v. N. J. S. Co.*, 45 N. Y. 34 (1871); *Felcher v. McMillan*, 103 Mich. 494, 61 N. W. 791 (1895); *Dowd v. Wadsworth*, 13 N. C. 130 (2 Dev.) 18 Am. Dec. 567 (1829); *Watt v. Potter*, 2 Mason, (U. S. C. C.) 77 (1820).

97. *Merz v. Chic., etc., Ry. Co.*, 86 Minn. 33, 90 N. W. 7 (1902); *Hett v. R. R.*, 69 N. H. 139, 44 At. 910 (1897); *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 177, 35 Am. Dec.

97a. *Donnell v. Can. Pac. Ry.*, — Me. —, 84 At. 1002 (1912). Defendant's wrongful refusal to give the plaintiff the key to the warehouse, until too late to save the goods from fire, was held to amount to conversion.

98. *The Idaho*, 93 U. S. 575, 23 L. Ed. 278 (1876); *Nat. Bank of Commerce v. Chic., etc., Ry.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. R. 566 (1890). In *Kohn v. Richmond, etc., Ry.*, 37 S. C. 1, 16 S. E. 376, 24 L. R. A. 100, 34 Am. St. R. 734 (1892), with valuable note, it was held that a common carrier, receiving goods for transportation, is liable for conversion in failing to deliver to their true owner upon a demand, only when such demand is made under and accompanied by legal process; *Shellnut v. Central of Ga. Ry.*, 131 Ga. 404, 407, 62 S. E. 294, 18 L. R. A., N. S. 494 (1908).

ants, he should demand a bond of indemnity from the one to whom he delivers, or should interplead them.⁹⁹

438. Conversion by a Tenant in Common. The mere refusal of one tenant in common of personalty, to permit his co-tenant to use or possess it, is not a conversion, ordinarily. When two persons have an equal title to an indivisible chattel, such as an ox, a horse or a cow, it is said, neither can enjoy his moiety without actual and exclusive possession of the chattel. Hence, neither can lawfully compel the other to surrender possession. The one excluded from possession has no legal remedy, except to take it when he can see fit.¹⁰⁰

If, however, one tenant in common destroys the property, or does an act equivalent to its destruction, he is guilty of conversion.¹ When he sells and delivers it as his sole property, he commits conversion, according to the weight of authority in this country.² It is submitted that this is the correct view, because he is doing an act which he intends as a repudiation of his co-tenant's title and a defiance of his dominion. In England, such a sale is not treated as a conversion³ unless possibly it is a sale in market overt.⁴ In the latter case, the purchaser becomes the legal owner of the entire chattel, which is thereby lost to the non-consenting co-owner.

In this country, an exception has been made to the general rule stated above, with respect to fungible goods. As they are alike in quality and value, and divisible by weight, measure or number, one co-tenant may sever and take out his share, without interfering with the other co-tenant's right of enjoyment of his share. Accordingly, if the tenant in possession refuses to permit a division,

⁹⁹. *Ball v. Liney*, 48 N. Y. 6, 8 Am. R. 511 (1871); *Hutchinson on Carriers* (2d Ed.) 407. ². *Perminter v. Kelly*, 18 Al. 716, 54 Am. Dec. 177 (1851); *Goell v. Morse*, 126 Mass. 480 (1879); *White v. Osborn*, 21 Wend. 72 (1839).

¹⁰⁰. *Coke on Littleton*, § 323; *Southworth v. Smith*, 27 Conn. 355, 71 Am. Dec. 72 (1858); *Hudson v. Swan*, 83 N. Y. 552 (1881). ³. *Mayhew v. Herrick*, 7 C. B. 229, 18 L. J. C. P. 179 (1849); *Sanborn v. Morrill*, 15 Vt. 700, 40 Am. Dec. 701 (1843), accord.

¹. *Morgan v. Marquis*, 9 Ex. 145, 148, 23 L. J. Ex. 21 (1853); *Jacobs v. Seward*, L. R. 5 H. L. 464, 475, 41 L. J. C. P. 221 (1871); *Osborn v. Schenck*, 83 N. Y. 201 (1880). ⁴. *Parke, B.*, in *Farrar v. Beswick*, 1 M. & W. 682, 688, Tyrwh. & Gr. 1053 (1836).

he exercises an unjustifiable dominion over the property and is guilty of conversion.⁵

439. **Conversion by Pledgee.** It is admitted, both in England and in this country, that in case of a bailment other than a pledge, a sale by the bailee without authority "determines the contract, the right of possession at once reverts to the owner, and he can treat the sale as a conversion."⁶ In England, however, it is held that a sale of the property by the pledgee does not amount to a conversion, because the pledgor has no right of possession until he tenders what is due on the pledge.⁷ In this country, it has been held that when a pledgee sells the collateral, without authority from, notice to, or an accounting with the pledgor, he is guilty of conversion, and the pledgor's right of action is consummate.⁸ This, it is submitted, is the better view.

440. **Tender of Converted Goods by Defendant.** Since Lord Mansfield's time the English courts have allowed the converter to bar the cause of action by a return of the goods, and, if a suit has been commenced, by the payment of costs; when the goods are of "an ascertained quantity and value, and there are no circumstances that can enhance the damages above the real value."⁹ This course was admitted by Lord Kenyon¹⁰ to be inconsistent with the earlier decisions,¹¹ and is not followed when the plaintiff is enti-

5. *Pickering v. Moore*, 67 N. H. Upham v. Barbour, 65 Minn. 364, 68 533, 32 At. 828, 68 Am. St. R. 695, 31 N. W. 42 (1896); *Woodworth v. Has-* L. R. A. 698 (1894); *Gates v. Bow-* call, 59 Neb. 124, 80 N. W. 483 ers, 169 N. Y. 14, 61 N. E. 993, 88 (1899); *Stearns v. Marsh*, 4 Den. Am. St. R. 530 (1901). 227, 47 Am. Dec. 248 (1847); *Top-*

6. *Clerk & Lindsell, Torts*, (2d Ed.) 223; *Cooper v. Willomat*, 1 C. 1059 (1900); *Blood v. Erie Dime Co.*, B. 672, 14 L. J. C. P. 219 (1845). 164 Pa. 95, 105, 30 At. 362 (1894);

7. *Donald v. Suckling*, L. R. 1 Q. B. 585, 35 L. J. Q. B. 232 (1866); *Utah*, 305, 320, 47 Pac. 147 (1896), *Halliday v. Holgate*, L. R. 3 Ex. 299, accord. 37 L. J. Exch. 174 (1868).

8. *Richardson v. Ashby*, 132 Mo. (1762). 238, 247, 33 S. W. 806 (1895); *War-* 10. *Pickering v. Truste*, 7 D. & E. 53 (1796).

9. *Fisher v. Prince*, 3 Burr. 1363 11. *Wilcock's Case*, 2 Salk. 597 659 (1894); *Fay v. Gray*, 124 Mass. 500 (1877); *Stevens v. Wiley*, 165 (1704); *Bowington v. Parry*, 2 Mass. 402, 407, 43 N. E. 177 (1896); *Strange* 822 (1729); *Olivant v. Per-*

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bled to punitive damages, or the value of the converted property is in dispute.¹² The defendant is always allowed, however, to return the property, and to have it applied in mitigation of damages.¹³

This doctrine has been accepted by some of our courts,¹⁴ but the prevailing rule is that of the early common law, which permits the owner of converted property to abandon it to the converter and recover its value, as well as any special or punitive damages to which he can show himself entitled.¹⁵ If he elects so to do, the property thereafter cannot be attached as his,¹⁶ nor is he under any duty to defend suits relating to the property, or to aid the converter in disposing of it.¹⁷

ineau, 2 Strange 1191, 1 Will. 23 Me. 377, 39 Am. 337 (1881); Northrup v. McGill, 27 Mich. 234 (1873); (1743).

12. Pickering v. Truste, 7 D. & E. Stickney v. Allen, 10 Gray (76 Mass.) 53, 54 (1796); Tucker v. Wright, 3 352 (1858); Gilbert v. Peck, 43 Mo. Bing. 601 (1826). App. 577 (1890); denying the right

13. Plevin v. Henshall, 10 Bing. 24 to return, when the conversion is (1833); Hlort v. L. & N. W. Ry., 4 willful; Comm. Bank v. Hughes, 17 Ex. D. 188, 48 L. J. Ex. 545 (1879). Wend. (N. Y.) 91 (1837); Brewster

14. Ward v. Moffett, 38 Mo. App. v. Silliman, 38 N. Y. 423 (1868); 395 (1889); Bigelow Co. v. Heintze, Baltimore Ry. v. O'Donnell, 49 O. 53 N. J. L. 69, 21 At. 109 (1890), re- St. 489, 32 N. E. 476, 21 L. R. A. 117 (1892); Weaver v. Ashcroft, 50 Tex. turn allowed when conversion not 427 (1878); Hofschulte v. Panhandle Rutland Ry. v. Bank, 32 Vt. 639 Co., 50 S. W. (Tex. Civ. App.) 608 (1860); Farr v. State Bank, 87 Wis. (1899).

223, 58 N. W. 377, 41 Am. St. R. 40 16. Hamilton v. Chic., M. & St. P. Ry., 103 Ia. 325, 72 N. W. 536 (1897).

(1894), tender allowed before suit, 17. Atchison, T. & S. F. Ry. v. Sriver, 72 Kan. 550, 84 Pac. 119, 4 if the conversion resulted from mis- L. R. A., N. S. 1056 (1906).

15. Norman v. Rodgers, 29 Ark. 365 (1874); Carpenter v. Dresser, 72

CHAPTER XIII.

DECEIT AND KINDRED TORTS.

§ 1. DECEIT.

441. As a Tort. Our discussion of this prolific source of litigation will be comparatively brief, for it is limited to deceit as a tort; that is, as a cause of action at common law for damages. Neither the right of the party deceived to rescind a contract induced thereby, nor his right to equitable relief comes within the scope of the present work. Although deceit, as a tort, is a much narrower topic than fraud, in its various relations to the law of contracts, to the law of property and to equity jurisprudence, it is much more extensive than it was three centuries,¹ or even a hundred and fifty years ago.²

442. Deceit Defined. "Where one person makes a statement to another which (1) is untrue; and which (2) the person making it does not believe to be true, whether knowing it to be untrue, or being ignorant whether it is true or not; and which (3) the person making it intends or expects to be acted upon, in a certain manner by the person to whom it is made, or with ordinary sense and prudence would expect it to be so acted upon; and (4) in reliance on which the person to whom it is made does act in that manner to

1. If the reader would compare in case of a false "warranty of the the modern limits of this topic with length of cloaths." those of three and a half centuries ago, he need only refer to Fitzherbert's *Natura Brevium*, published in 1534. He says, "This writ (*de deceit*) lieth properly when one man doeth anything in the name of another, by which the person is damaged and deceived." He then gives several pages of precedents, nearly every one of which involves a case of false personation or a case of the improper use of legal process. At 99k he gives a precedent for the writ

2. The anonymous author of *Actions on the Case for Torts and Wrongs* (London, 1720) devotes Chapter IX to "Actions on the case for Discelts and on Warranties." It contains but little matter of value to the lawyer of today, but it shows that the judicial conception of deceit as a tort was quite different, at the opening of the 18th Century, from that which is entertained at the opening of the 20th Century.

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his own harm; then the person making the statement is said to deceive the person to whom it is made.”³

443. Statement of Fact. It is not every untrue statement, connected with a transaction, which will sustain an action for deceit, although it be shown to have induced the plaintiff to act to his harm. A mere promise to do an act in the future is an illustration. A broken promise, although causing harm to the promisee, is not a tort. If it were, the distinction between breaches of contract and torts would disappear.⁴

It is to be borne in mind, however, that a statement may be a representation of fact although it takes the form of a promise. Accordingly, if A is induced to accept bills, drawn on him by B, by C's statement that no part of the proceeds shall be applied to B's indebtedness to C, and if A shows that C intended, when the statement was made, to apply the proceeds to his claim against B, and did so apply them to A's harm, C is liable in an action for deceit.⁵ A man, who buys goods on credit, not only promises to pay for them, but either expressly or impliedly represents that he intends to pay for them. If, in truth, he has no such intention,

3. Sir Frederick Pollock's Draft of a Civil Wrongs Bill for India, sec. 40; Taylor v. Commercial Bank, 174 N. Y. 181, 185, 66 N. E. 726, 95 Am. St. R. 564 (1903).

4. Union Pac. Ry. v. Barnes, 64 Fed. 84 (1894): A promise to sell land and convey a perfect title by one who believes his title is good, when in fact it is defective; **Smith v. Parker, 148 Ind. 127, 45 N. E. 770 (1897):** A promise to furnish the money for a specified business; **Ayers v. Blevins, 28 Ind. App. 101, 62 N. E. 305 (1901):** A promise to make certain machinery work up to a stated capacity; **Long v. Woodman, 58 Me. 49 (1870):** A promise to give a bond for the reconveyance of certain property; **Syracuse Knitting Co. v. Blanchard, 69 N. H. 447, 43 At. 637 (1899):** A promise that the

dealings of defendant and plaintiff “should be more satisfactory than last season”; **Gray v. Palmer, 2 Robt. (N. Y.) 500 (1864):** A promise to collect a draft and apply the proceeds in a specified manner; **Taylor v. Commercial Bank, 174 N. Y. 181, 66 N. E. 726, 95 Am. St. R. 564 (1903):** An assurance that plaintiff would get his pay, if he made a loan to a third person.

5. Clydesdale Bank v. Paton, (1896) A. C. 381, 394, 65 L. J. P. C. 73. In this case, there was no evidence either that the bank did not have the intention of keeping its promise, or that it broke it. **Cockrill v. Hall, 65 Cal. 326 (1884):** A promise to return a note the next day, or pay it, inducing plaintiff to act to his harm.

hopelessly insolvent, is guilty of deceiving his depositors.¹¹ So is a father, who induces another to give credit to his son, by a letter from which he omits the statement that the son is a minor. Such silence is designed to mislead.¹²

445. Opinion as Distinguished from Fact. In order to make out a case of deceit, the plaintiff must show that the defendant's false statement was one of fact, as distinguished from one of opinion, or belief.¹³ "If," said a learned judge, "the defendant went no further than to say that the bond was an A No. 1 bond, which we understand to mean simply that it was a first-rate bond, or that the railroad was good security for the bond, we are constrained to hold that he was not liable under the circumstances of this case, even if he made the statement in bad faith. The rule of law is hardly to be regretted, when it is considered, how easily and insensibly, words of hope or expectation are converted by an interested memory into statements of quality and value, when the expectation has been disappointed."¹⁴

Hence, statements by a seller, relative to the value or quality of

11. Anonymous, 67 N. Y. 598 A. 417, with valuable note, 54 Am. (1876); Cassidy v. Uhlman, 170 N. St. R. 628 (1895), an action for deceit was sustained for false and fraudulent representations that the defendant's disease was curable and would be cured by the defendant for five hundred dollars. The liability for deceit, it was held, "may arise where one has or assumes to have knowledge upon a subject of which the other is ignorant, and knowingly makes false statements, on which the other relies"; American Soda Fountain Co. v. Spring Water C. Co., 207 Mass. 488, 93 N. E. 801 (1911), "a representation that special draught arms, to be manufactured as per drawing submitted, would accomplish certain things, was a mere expression of opinion."

12. Kidney v. Stoddard, 7 Met. (48 Mass.) 252 (1843). "Such a partial and fragmentary statement of fact, as that, the withholding of that which is not stated makes that which is stated absolutely false," will sustain an action for deceit, Lord Cairns, in Peek v. Gurney, R. 6 H. L. 377, 403, 43 L. J. Ch. 19 (1873). "To tell half a truth only is to conceal the other half," Mitchell, J., in Newell v. Randall, 32 Minn. 171, 50 Am. R. 562 (1884); Croyle v. Moses, 90 Pa. 250, 35 Am. R. 654 (1879); an artful and evasive answer, intended to deceive and actually deceiving the plaintiff.

13. In Hedin v. Minn. etc., Inst., 62 Minn. 146, 64 N. W. 158, 35 L. R. 107, 2 L. R. A. 743 (1889).

14. Holmes, J., in Deming v. Darling, 148 Mass. 504, 505, 20 N. E.

goods, are generally treated as expressions of opinion.¹⁵ If, however, the seller, goes beyond the limits of mere puffing and makes assertions of fact upon which the opinion is represented to rest, as that the goods are new and fresh, when they are old and shop-worn, he makes himself liable for deceit.¹⁶ At times, it may be difficult to determine whether the statement involves an assertion of fact as well as an expression of opinion. In such cases the question is for the jury.¹⁷

446. Statements as to the price paid or offered for property are held by some courts to be "so manifestly statements of opinion on the part of the seller, or mere evidence of the opinion of others respecting its value, that they cannot be deemed statements of material facts which will lay the foundation for an action for deceit, even if the statements are false and intended to deceive."¹⁸ The courts, however, are ready to lay hold of any additional statements or circumstances, indicative of the defendant's fraudulent purpose, as a club with which to beat him, when he has lied about the price paid or offered.¹⁹

15. *Harvey v. Young*, Yelv. 21 (1597); *Ekins v. Tresham*, 1 Lev. 102 (1675); *Gustafson v. Rustemeyer*, 70 Conn. 125, 39 At. 104, 39 L. R. A. 644, 66 Am. St. R. 92 (1898); *Williams v. McFadden*, 23 Fla. 143, 148, 1 So. 618, 11 Am. St. R. 345 (1887), "Human opinion is so various and discordant, and what it really is, is so difficult of proof, that the law allows great latitude of statements which are properly traceable to it;" *Gordon v. Parmelee*, 2 Allen (84 Mass.) 212 (1861); *Gordon v. Butler*, 105 U. S. 553, 26 L. Ed. 1166 (1881).

16. *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 444 (1899); *Stewart v. Stearns*, 63 N. H. 99, 56 Am. R. 496 (1884); cf. *Martin v. Jordan*, 60 Me. 531 (1872), false statement, as to the amount of hay cut the previous year, on the land sold by the defendant to the plaintiff; *Savage v. Stevens*, 126 Mass. 207 (1879), false statements as to the location and condition of a farm.

17. *Andrews v. Jackson*, 168 Mass. 266, 47 N. E. 412, 60 Am. St. R. 390, 37 L. R. A. 402 (1897); *Simar v. Canady*, 53 N. Y. 298, 13 Am. R. 523 (1873).

18. *Cole v. Smith*, 26 Col. 506, 58 Pac. 1086 (1899); *Hemmer v. Cooper*, 8 Allen (90 Mass.) 334 (1864); *Holbrook v. Connor*, 60 Me. 578, 11 Am. R. 212 (1872), see dissenting opinion; *Bishop v. Small*, 63 Me. 12 (1874); *Van Slochem v. Villard*, 207 N. Y. 587, 101 N. E. 1124 (1913).

19. *Braley v. Powers*, 92 Me. 203, 42 At. 362 (1898): An action for deceit was sustained, for false statements as to the cost of producing buckles, under a patent which defendant sold plaintiff; *Manning v.*

447. Other courts do not hesitate to declare that the statement of a vendor that he paid or had been offered a certain price for the property he sells, is a statement of fact; and if the purchaser, without knowing or having reason to know what price was paid or offered, relies upon the false statement to his injury, he is entitled to maintain an action for deceit.²⁰ They also declare, that false statements as to value may often take the form of false assertions of fact, and thus amount to actionable deceit;²¹ especially where they are grossly and palpably false, or where their utterer has better means of knowing their truth or falsity than has the one to whom they are made.²² So, inducing one to sell goods at a certain

Albee, 11 Allen (93 Mass.) 520, 92 Am. Dec. 736 (1866): The statement was that certain bonds were selling in the market at a given price; Way v. Ryther, 165 Mass. 226, 42 N. E. 1128 (1896): Statement, that the property was billed to the defendant at a certain price, together with the false statement that he could not find the bill, may constitute deceit. "We have no disposition," said the court, "to extend the decisions in favor of vendors' representations beyond the limit to which they have gone;" Kilgore v. Bruce, 166 Mass. 136, 44 N. E. 108 (1896). Representation, that all the stock, which the defendant was selling, was being sold at the price asked of the plaintiff; Reggio v. Warren, 207 Mass. 525, 93 N. E. 805, 32 L. R. A., N. S. 340 (1911): "The old rule that fraudulent representations may be such that one is not justified in acting upon them is now somewhat relaxed in order that persons guilty of actual fraud may not too easily escape liability by setting up their victim's undue guilelessness." Kaiser v. Nummedor, 120 Wis. 234, 97 N. W. 932 (1904), that the inventory showed a total value of \$8,531, when it footed only \$6,531.

20. Dorr v. Cory, 108 Ia. 725, 78 N. W. 682 (1889); Johnson v. Gavitt, 114 Ia. 183, 80 N. W. 256 (1901); Stony Creek Woolen Co. v. Smalley, 111 Mich. 321, 69 N. W. 722 (1896); Conlan v. Roemer, 52 N. J. L. 53, 18 At. 858 (1889); Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. R. 701 (1893).

21. Wilson v. Nichols, 72 Conn. 173, 43 At. 1052 (1899); Shelton v. Healy, 74 Conn. 265, 50 Atl. 742 (1901); Leonard v. Springer, 197 Ill. 532, 64 N. E. 299 (1902). "Where false statements of value are made with an intention that they shall be understood as statements of fact, and not as expressions of opinion, they will constitute fraud;" Coulter v. Clark, 160 Ind. 311, 66 N. E. 739 (1903); Bish v. Beatty, 111 Ind. 403, 12 N. E. 523 (1887); statement that certain notes were as good as government bonds; Smith v. Countryman, 30 N. Y. 655 (1864); Rothschild v. Mack, 115 N. Y. 1, 21 N. E. 726 (1889): Assertion that a note was as good as the Bank of England; Van Sloechen v. Villard, 207 N. Y. 587, — N. E. — (1913).

22. Hedin v. Minn., etc., Inst., 62 Minn. 146, 64 N. W. 158, 54 Am. St. R. 628, 35 L. R. A. 417 (1895) and

price, by the false statement of the purchaser, that the seller's rivals in trade offer the same goods at such a price, is a fraud;²³ or inducing a retailer to order defendant's goods by falsely stating that he had not sold any like goods to any merchant in the place.^{23a}

448. Statement as to a Person's Credit. This, undoubtedly, involves to some extent an expression of opinion, but ordinarily it contains an assertion of fact. If the defendant is asked, by one who is considering whether to give financial credit to him or to a third person, for the pecuniary standing of himself or of the third person, and answers that he is a person "safely to be trusted and given credit to in that respect,"²⁴ or that he is "as good as any man in the country for that sum,"²⁵ he certainly assumes to state a matter of fact. If this statement was consciously false, was made for the purpose of inducing the plaintiff to give credit, and such credit was given to the plaintiff's harm, most courts have not hesitated to hold him liable for deceit.²⁶ In England, and in some of our jurisdictions statutes have been passed providing that no action shall be brought upon such representations, unless made in writing and signed by the party to be charged therewith.²⁷

cases cited in the note at pp. 418, inclined to hold the defendant for 427-429; *Pinch v. Hotaling*, 142 Mich. 521, 106 N. W. 69 (1905).

23. *Smith Kline & Co. v. Smith*, 166 Pa. 563, 31 At. 343 (1895).

23a. *Pratt v. Darling*, 125 Wis. 93, 103 N. W. 229 (1905).

24. *Pasley v. Freeman*, 3 D. & E. 51, 1 R. R. 638 (1789).

25. *Upton v. Vail*, 6 Johns. 181, 5 Am. Dec. 210 (1810); *Boyd's Executors v. Browne*, 6 Pa. 310 (1847); *Robbins v. Barton*, 50 Kan. 120, 31 Pac. 686 (1892).

26. *Endsley v. Johns*, 120 Ill. 469, 60 Am. R. 572 (1887); *Patten v. Gurney*, 17 Mass. 182, 9 Am. Dec. 141 (1821); *Morehouse v. Yeager*, 71 N. Y. 594 (1877); *Gainsville Natl. Bank v. Bamberger*, 77 Tex. 48, 13 S. W. 959 (1890); *Lang v. Lee*, 3 Rand. (Va.) 410 (1825).

In Rhode Island, the court is not

statements about his own financial standing as strictly as for those about a third person. *Lyons v. Brigg*, 14 R. I. 222, 51 Am. R. 372 (1893); *White & Co. v. Fitch*, 19 R. I. 687, 36 At. 425 (1897); Vermont is not disposed to hold a person answerable in deceit for false assertions as to credit. *Fisher v. Brown*, 1 Tyler 387, 4 Am. Dec. 726; *Jude v. Woodburn*, 27 Vt. 415 (1855). See also *Savage v. Jackson*, 19 Ga. 305 (1856), criticising *Pasley v. Freeman*, 3 D. & E. 51 (1789).

27. Lord Tenterden's Act, 9 Geo. IV. ch. 14, § 6 (1829); *Nevada Bank v. Portland Natl. Bank*, 59 Fed. 338 (1894); applying the statute of Oregon;—1 Hill's Code, § 786, p. 594; *Kimball v. Comstock*, 14 Gray (80 Mass.) 508 (1860), applying the Massachusetts statute.

449. Misrepresentation of Law. The general rule, upon this topic, is that "a false or mistaken representation of what the law is upon an admitted state of facts is no basis of an action in deceit, especially when there are no confidential relations between the parties."²⁸ Or to put it in another form, "A statement of opinion upon a question of law, when the facts are equally well known to both the parties, cannot constitute a false representation or deceit."²⁹

Where, however, there is a misrepresentation of fact as well as of law,³⁰ or where "any peculiar relationship of trust or confidence exists between the parties, and one avails himself of such a trust or confidence to mislead the plaintiff by a misrepresentation as to the legal effect of the transaction," we have an exception to the general rule stated above, and an action for deceit may lie.³¹ Perhaps, the distinction between a misrepresentation of law, and a misrepresentation of mixed law and fact, has never been stated more clearly than by a learned English judge³² in these words: "A misrepresentation of law is this, when you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law. But when you state that as a fact which no doubt involves, as most

²⁸. *Gormley v. Gym. Ass'n*, 55 Wis. 105 (1871); *Starr v. Bennett*, 5 Hill 350, 13 N. W. 242 (1882); defendant, (N. Y.) 303 (1843).

when leasing a hall to plaintiff, said, ³⁰. *Westervelt v. Demarest*, 46 N. J. L. 37, 50 Am. R. 400 (1884); *More-liquors, etc., at the bar, under licenses land v. Atchison*, 19 Tex. 303 (1857); held by me." Plaintiff was bound to *Hubbard v. McLean*, 115 Wis. 9, 90 know that such licenses would not N. W. 1077 (1902).

protect him; *Fish v. Cleland*, 33 Ill. 238, 243 (1864); *Thompson v. Phoenix Ins. Co.*, 75 Me 55, 46 Am. R. 357 (1883); *Ins. Co. v. Reed*, 33 O. St. 283, 294 (1877). ³¹. *Townsend v. Cowles*, 31 Al. 428, 436 (1858): "So, if the plaintiff was in fact ignorant of the law, and defendant took advantage of such ignorance, to mislead him by a false statement of the law, it would constitute a fraud;" *Cooke v. Nathan*, 16 Barb. (N. Y.) 342 (1853); *Hirshfield v. London Ry.*, 2 Q. B. D. 1, 46 L. J. Q. B. 94 (1876).

²⁹. *Mutual Life Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. 906 (1900); *Upton v. Tribelcock*, 91 U. S. 45, 50 (1875); *Davis v. Betz*, 66 Al. 206, 210 (1880); *Platt v. Scott*, 6 Blackf. (Ind.) 389, 39 Am. Dec. 436 (1843); *Mayhew v. Phoenix Ins. Co.*, 23 Mich. ³². *Jessel, M R., in Eaglesfield v. Londonderry*, L. R. 4 Ch. D. 693, 702, 35 L. T. 822 (1876).

facts do, a conclusion of law, that is still a statement of fact and not a statement of law." ^{32a}

450. Knowledge of the Untruth. Bad faith is the very essence of the common law tort of deceit. Accordingly, it is generally held that the plaintiff, who asks damages for deceit, must show, that the defendant knew that the false statement complained of was untrue, or that he made it without belief in its truth, or recklessly, careless whether it was true or false. It is not enough for him to show that the statement was false, and was made negligently, or without reasonable ground for belief in its truth. He must go further and show that it was actually fraudulent, that is, that the defendant did not have an honest belief in its truth.³³

451. It should be borne in mind, however, that evidence of negligence on the part of defendant in making the false statement, as well as the want of reasonable ground for his belief in its truth, is always admissible in an action for deceit. To quote from the principal opinion in *Peek v. Derry*:³⁴ "I desire to say distinctly that when a false statement has been made, the question whether

32a. *Van Slochem v. Villard*, 207 N. Y. 587, 101 N. E. 1124 (1913). State representation, as distinguished from fraudulent representation, could be maintained. There was considerable authority that it could, and there was considerable authority that it could not." *Wilman v. Mizer*, 60 Ark. N. S. 819 (1907); *Morrill v. Palmer*, 281, 30 S. W. 31 (1895); *Watson v. Jones*, 41 Fla. 241, 25 So. 678 (1899); *Boddy v. Henry*, 113 Ia. 462, 85 N. W. 771, 53 L. R. A. 769 (1901); *Wilkins v. Standard Oil Co.*, 70 N. J. L. 449, 57 At. 258 (1904); *Daly v. Wise*, 132 N. Y. 306, 312, 30 N. E. 837, 16 L. R. A. 236 (1892); *Johnson v. Cate*, 75 Vt. 100, 53 At. 329 (1902); *Cooper v. Schlesinger*, 111 U. S. 148, 152, 4 Sup. Ct. 360, 28 L. Ed. 382 (1883); *Iron Co. v. Bamford*, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215 (1893); *Simon v. Goodyear Co.*, 105 Fed. 573, 581 (1900).

33. *Derry v. Peek*, 14 App. Cases 337, 58 L. J. Ch. 864 (1889), reversing *Peek v. Derry*, 37 Ch. D. 541, 57 L. J. Ch. 347 (1887). In *Angus v. Clifford* (1891), 2 Ch. 449, 463, 60 L. J. Ch. 443, Lindley, L. J., said: "Speaking broadly of *Peek v. Derry*, I take it, that it has settled, once and for all, the controversy which was well known to have given rise to very considerable difference of opinion, as to whether an action for negligent representation, as distinguished from fraudulent representation, could be maintained. There was considerable authority that it could, and there was considerable authority that it could not." *Wilman v. Mizer*, 60 Ark. N. S. 819 (1907); *Morrill v. Palmer*, 281, 30 S. W. 31 (1895); *Watson v. Jones*, 41 Fla. 241, 25 So. 678 (1899); *Boddy v. Henry*, 113 Ia. 462, 85 N. W. 771, 53 L. R. A. 769 (1901); *Wilkins v. Standard Oil Co.*, 70 N. J. L. 449, 57 At. 258 (1904); *Daly v. Wise*, 132 N. Y. 306, 312, 30 N. E. 837, 16 L. R. A. 236 (1892); *Johnson v. Cate*, 75 Vt. 100, 53 At. 329 (1902); *Cooper v. Schlesinger*, 111 U. S. 148, 152, 4 Sup. Ct. 360, 28 L. Ed. 382 (1883); *Iron Co. v. Bamford*, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215 (1893); *Simon v. Goodyear Co.*, 105 Fed. 573, 581 (1900).

34. *Herschell, L.*, in *Derry v. Peek*, 14 App. Cas. 337, 370, 58 L. J. Ch. 864 (1889).

there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. } The ground upon which an alleged belief was founded is a most important test of its reality. } I can conceive many cases where the fact, that an alleged belief was destitute of all reasonable foundation, would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated what was false."

On the other hand, it is admissible for the defendant to give evidence, tending to show his honest belief in the truth of the statement, which was in fact false, and even to show the meaning, which he actually intended to convey by equivocal language.³⁵

452. Other Remedies Available for Negligent Misrepresentation. Many of the courts, which hold most steadfastly to the doctrine that actual fraud must be shown to sustain an action for deceit, are careful to point out that the law affords other remedies to the victim of innocent misrepresentation. He may maintain an action for breach of warranty,³⁶ or for rescission of the contract,³⁷

35. *Angus v. Clifford*, (1891) 2 Ch. 449, 60 L. J. Ch. 443, opinion of Lindley, L. J.; *Nash v. Minn., etc., Co.*, 163 Mass. 574, 40 N. E. 1039, 23 L. R. A. 753, 47 Am. St. R. 489 (1895), "Inasmuch as the question involved is what was his state of mind, and his actual intent as distinguished from his apparent intent, he is entitled to explain his language as best he can, if it is susceptible of explanation, and to testify what was in his mind in reference to the subject to which the alleged fraud relates. In this respect his expressions, whether spoken or written, are not dealt with in the same way, as when the question is, what contract has been made between two persons, who were mutually relying upon the language used in their agreements;" *Kountze v. Kennedy*, 147 N. Y. 129, 41 N. E. 414, 49 Am. St. R. 651, 29 L. R. A. 363 (1895).
36. *Kountze v. Kennedy*, *supra*; *Stone v. Denny*, 4 Met. (45 Mass.) 151, 156 (1842); *Watson v. Jones*, 41 Fla. 241, 25 So. 678 (1899).
37. *Smith v. Bricker*, 86 Ia. 285, 53 N. W. 250 (1892); *Foard v. McComb*, 12 Bush (75 Ky.) 723 (1877); *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 At. 390, 10 L. R. A., N. S. 245 (1906).

or even for damages caused by the defendant's negligent discharge of some duty owing to the plaintiff.³⁸

In some jurisdictions, he is allowed to maintain an action for deceit, wherever the misrepresentation is of a character which would entitle him to rescission of the transaction.³⁹ In others, the rule is declared to be that "if a statement of fact which is susceptible of actual knowledge is made as of one's own knowledge, and is false, it may be made a foundation of an action of deceit, without further proof of an actual intent to deceive."⁴⁰

453. Intended to Induce Plaintiff. Not only must the plaintiff show that the defendant dishonestly made a false statement of fact, but there must be evidence that he made it with the intention of inducing the plaintiff to act upon it. "A mere naked falsehood is not enough to give a cause of action; the falsehood must have been told with the intention that it should be acted upon by the party injured."⁴¹ It is not necessary, however, that the falsehood be communicated directly to the plaintiff by the defendant. It is

38. *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827, 65 Am. St. R. 699 (1898).

39. *Walters v. Eaves*, 105 Ga. 584, 32 S. E. 609 (1899); *Gerner v. Mosher*, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244 (1899); *Shea v. Mabry*, 1 Lea (69 Tenn.) 319, 342 (1878), "Culpable negligence in making false statements, to induce action by others, is in law equivalent to fraud;" *Seale v. Baker*, 70 Tex. 283, 7 S. W. 742, 8 Am. St. R. 592 (1888); *Hoffman v. Dixon*, 105 Wis. 315, 81 N. W. 491 (1900). See a valuable discussion of this topic, by Professor Williston in 24 Harv. Law Rev. 415 (1911).

40. *Weeks v. Currier*, 172 Mass. 53, 55, 51 N. E. 416 (1898), citing with other cases *Chatham Furnace Co. v. Moffat*, 147 Mass. 403, 18 N. E. 168, 9 Am. St. 727 (1888), holding that "forgetfulness of the existence of a fact after a former knowledge, or a

mere belief on the subject, will not excuse a statement of actual knowledge;" but see *Nash v. Minn., etc. Co.*, 163 Mass. 574, at page 578. The present doctrine in Massachusetts is stated and authorities pro and con are fully digested in *Mabrody v. McHugh*, 202 Mass. 148, 88 N. E. 894, 23 L. R. A., N. S. 487, 132 Am. St. R. 484 (1909).

41. *Langridge v. Levy*, 2 M. & W. 519 (1837), citing *Pasley v. Freeman*, 3 D. & E. 51 (1789); *Thorp v. Smith*, 18 Wash. 277, 51 Pac. 381 (1897); *Steiner Brothers v. Clisby*, 103 Al. 181, 192, 15 So. 612 (1893). "If the false representation is made to A to induce him to part with his money, and he does part with it, A must sue; but if made to him to induce B to part with his, and B is thereby induced to do so, he and not A is the party injured who may maintain the action," following *Wells v. Cook*, 16 O. St. 67, 88 Am. Dec. 436 (1865).

enough that the false statement was intended to reach the plaintiff and operate upon his mind.⁴² One who puts into circulation a bill of exchange, with a forged acceptance, thereby makes a representation of its genuineness to every one to whom it is presented.⁴³ One who makes a false statement of his financial standing to a mercantile agency, intends that it shall be repeated by the agency to third persons who may be interested in his credit.⁴⁴ Whether a false statement by the directors of a financial institution, contained in a report which the law requires to be filed in a public office, may subject them, or the corporation for which they are acting, to a suit for deceit, should depend upon the facts of the case. If the statute requires this statement for the benefit of all, who may deal with the institution, or purchase its stock, then, the statement must be deemed intended to influence any of that class.⁴⁵ Even if the statute has no such object, and requires the statement only for the information of public officials, the question still remains, should the defendant have foreseen that reliance would be placed upon such a statement by the plaintiff, who is not a public official, but a creditor of the corporation or a purchaser of its stock? The prevailing view is, that such a consequence is too remote, and that the plaintiff has no action for deceit.⁴⁶

42. *Comm. v. Call*, 21 Pick. (38 cf. *Bedford v. Bagshaw*, 4 H. & N. Mass.) 515, 523, 32 Am. Dec. 284 538, 29 L. J. Ex. 59 (1859), statements made to a committee of the (1839); *Henry v. Dennis*, 95 Me. 24, 49 At. 58, 85 Am. St. R. 365 (1901). London Stock Exchange; *Peek v.*

43. *Polhill v. Walter*, 3 B. & Ad. Gurney, L. R. 6 H. L. 377, 43 L. J. 114, 37 R. R. 344 (1832); same principle applied in *Denton v. G. N. Ry.*, 5 E. & B. 860, 25 L. J. Q. B. 129 (1856), to false statements in a railroad time table.

44. *Eaton. Cole & Co. v. Avery*, 83 N. Y. 31, 38 Am. R. 389 (1880); *Tindle v. Birkett*, 171 N. Y. 520, 64 N. E. 210 (1902); *Hinchman v. Weeks*, 85 Mich. 535, 48 N. W. 790 (1891); *Gainsville Nat. Bank v. Bamberger*, 77 Tex. 48, 13 S. W. 959 (1890).

45. *Gerner v. Mosher*, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244 (1899);

46. *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733 (1891); *Merchant's Nat. Bank v. Armstrong*, 65 Fed. 932 (1895); *Hindman v. 1st Nat. Bank*, 86 Fed. 1013 (1898); S. C., 112 Fed. 931, 941, 50 C. C. A. 623 (1902); cf. English cases in last note; also, Clerk and Lindsell on Torts (2d Ed.), pp. 466-469; *McCracken v. West*, 17 O. 16 (1848); holding that if a person write

454. Corrupt Motive Unnecessary. If the defendant makes the false statement, with the intention of inducing the plaintiff to act upon it, and he does so act to his harm, the motive of the defendant becomes immaterial.⁴⁷ "Misrepresentations of this character are frequently made from inconsiderate good nature prompted by a desire to benefit a third person and without a view of advancing the utterer's own interests. But the motive by which he was actuated does not enter into the inquiry. If he made representations productive of loss to another, knowing such representations to be false, he is responsible as for a fraudulent deceit."⁴⁸

455. Inducing Plaintiff to Act. If the false statement of fact, knowingly made by the defendant, really induces the plaintiff to act upon it to his harm, the defendant may escape liability for deceit by showing that the assertion was of such a character as not to justify the plaintiff in placing confidence in it. It is quite clear that a dealer in spectacles has no right to rely on the statement by the manufacturer, that the glasses were of a superior quality, and treated by a chemical process which was known only to a person in the employ of the company; that this process imparted a quality to the glass that made it fit the eye indefinitely; that the glasses once fitted would always adapt themselves to the eye.⁴⁹

456. Some courts, as we have seen, treat false assertions concerning the cost of property, or of the price paid or offered for it, as statements, so commonly made by persons having property for sale, that the buyer has no right to rely and act upon them.⁵⁰ Other

a letter to another, desiring him to introduce the bearer to such merchants as he may desire, and describing him as a man of property and the bearer does not deliver it to the addressee, but uses it to obtain credit elsewhere, the person so giving credit cannot maintain an action for deceit, though the representations in the letter are untrue;" *Barry v. Crosky*, 2 Johns. & H. 1 (1861); *Webb v. Rockefeller*, 195 Mo. 57, 93 S. W. 778, 6 L. R. A., N. S. 872 (1906).

105 (1830); *Rothmiller v. Stein*, 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148 (1894).
48. *Boyd's Exec. v. Browne*, 6 Pa. 310 (1847); *Allen v. Addington*, 7 Wend (N. Y.) 9 (1831); *N. Y. Imp. Co. v. Chapman*, 118 N. Y. 288, 292 23 N. E. 187 (1890); *Endsley v. Johns*, 120 Ill. 479, 12 N. E. 247, 60 Am. R. 572 (1887).

49. *Hirschberg Optical Co. v. Michelson*, (Minn.) 95 N. W. 461 (1901).

50. *Vernon v. Keys*, 12 East 632, 4 Taunt. 488, 11 R. R. 499 (1810). Lord Mansfield is reported as saying that

47. *Pasley v. Freeman*, 3 D. & E. 51 (1798); *Foster v. Charles*, 7 Bing.

courts⁵¹ declare that wherever the interests of the plaintiff and defendant are adverse, it is the duty of the former to distrust the truthfulness of statements made by the latter.

As a rule, however, the plaintiff is not to be turned out of court, because a shrewd, keen, skeptical bargainer would not have been deluded by the intentionally false statement of the defendant. "It is as much actionable fraud willfully to deceive a credulous person, with an improbable falsehood, as it is to deceive a cautious, sagacious person with a plausible one."⁵² Or, in the language of another court, "The design of the law is to protect the weak and credulous, as well as those whose vigilance and sagacity enable them to protect themselves, * * * The law is not blind to the fact that communities are composed of individuals of several degrees of intelligence and capacity."⁵³ Or, again, "No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is, by chance, a fool."⁵⁴

457. Means of Knowledge Immaterial. While the law requires men in ordinary business transactions to use their wits, and not to confide implicitly in trader's talk on the part of one whose business interests are antagonistic to theirs,⁵⁵ it is not inclined to ignore or protect positive, intentional fraud, successfully practiced upon even the simple-minded and unwary.^{55a} It is not disposed to look with favor upon the defense that the plaintiff was guilty of contributory negligence, in not presuming that the defendant's state-

a purchaser is at liberty to do "what every seller in this town does every day, who tells every falsehood he can to induce the purchaser to purchase;" *Holbrook v. Connor*, 60 Me. 578 (1872); cf. *Whiting v. Price*, 169 Mass. 576, 48 N. E. 772, 61 Am. St. R. 307 (1897), holding that the representation, that the bond in question was secured by particular property worth half a million dollars, could not be excused as one of those generalities, which, whether true or not, are to be expected from a man who wants to sell his goods.

⁵¹. *Aetna Ins. Co. v. Reed*, 33 O. St. 283 (1877).

⁵². *Barndt v. Frederick*, 78 Wis. 1, 47 N. W. 6 (1890).

⁵³. *Ingalls v. Miller*, 121 Ind. 188, 22 N. E. 995 (1889).

⁵⁴. *Chamberlin v. Fuller*, 59 Vt. 256, 9 At. 832 (1886).

⁵⁵. *Slaughter's Admin. v. Gerson*, 13 Wall. (80 U. S.) 379 (1871); *Salem India Rubber Co. v. Adams*, 23 Pick. (40 Mass.) 256, 265 (1839); *Long v. Warren*, 68 N. Y. 426 (1877).

^{55a}. *Fischer v. Hillman*, — Wash. —, 122 Pac. 1016, 39 L. R. A., N. S. 1140, with extended note (1912).

ment was false, and untrustworthy.⁵⁶ Even when the defendant refers the plaintiff to a source of information, which would disclose the falsity of his statement, the plaintiff is not bound to avail himself of that source. He is entitled to stand upon the defendant's assurance of its truthfulness.⁵⁷

Of course, if he does pursue the investigation, suggested by the defendant, and acts upon its results, he cannot afterwards insist that he relied upon the defendant's representations.⁵⁸ Nor can he be heard to say, that he was induced by the false representation to act to his harm, where he discovers the fraud before he acts.⁵⁹ Nor will a deliberate falsehood avail him, though made by the defendant, with a view to deceiving him, if it was not known to him when he acted,⁶⁰ nor if, although it were known to him, it did not cause him damage.⁶¹

458. Need Not Be Sole Inducement. While the plaintiff, in an action of deceit, is bound to show that he had a right to rely and

⁵⁶ *Graham v. Thompson*, 55 Ark. 296, 18 S. W. 58 (1892); *Oakes v. W.* 320, 38 L. R. A., N. S. 301, with *Miller*, 11 Col. App. 374, 55 Pac. 193 extended note (1911).

(1898); *Maxfield v. Schwartz*, 45 Minn. 150, 47 N. W. 448, 10 L. R. A. 606 (1890); *Whiting v. Price*, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. R. 262 (1898); *Arnold v. Teel*, 182 Mass. 1, 64 N. E. 413 (1902); *Warder v. Whitish*, 77 Wis. 430, 46 N. W. 540 (1890); *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 444 (1897); *Reynell v. Sprye*, 1 DeG. M. & G. 660, 21 L. J. Ch. 633 (1852).

⁵⁷ *Wheeler v. Baars*, 33 Fla. 696, 15 So. 584 (1894); *Thorne v. Prentiss*, 83 Ill. 99 (1876); *David v. Park*, 103 Mass. 501 (1870); *Holst v. Stewart*, 161 Mass. 516, 37 N. E. 755 (1894); *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056 (1891); *Cotrill v. Krum*, 100 Mo. 397, 13 S. W. 753 (1890); *Albany Savings Bank v. Burdick*, 87 N. Y. 40 (1881); *Blacknall v. Rowland*, 108 N. C. 554, 13 S. E. 191 (1891); *Castenholz v. Heller*, 82 Wis. 30, 51 N. W. 432 (1892); *Bal-*

⁵⁸ *Enfield v. Colburn*, 63 N. H. 218 (1884); *Halls v. Thompson*, 1 Sm. & M. (Mass.) 443 (1843).

⁵⁹ *Selway v. Fogg*, 5 M. & W. 83, 8 L. J. Ex. 199 (1839); *Kingman v. Stoddard*, 85 Fed. 740, 57 U. S. App. 397, 29 C. C. A. 413 (1898); *Fitzpatrick v. Flannagan*, 106 U. S. 648, 660, 1 Sup. Ct. 369 (1882); *Schmidt v. Messmer*, 116 Cal. 267, 48 Pac. 54 (1897); *McEacheran v. Western, etc., Co.*, 97 Mich. 479, 56 N. W. 860 (1893); *Vernol v. Vernol*, 63 N. Y. 45 (1875).

⁶⁰ *Horsfall v. Thomas*, 1 H. & C. 90, 31 L. J. Ex. 322 (1862), a defect in a gun was artfully plugged and concealed, but the gun was bought without inspection; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376 (1899).

⁶¹ *Nye v. Merriam*, 35 Vt. 438 (1862); *Freeman v. Venner*, 120 Mass. 424 (1876).

did rely upon the defendant's false statement and was damaged as a proximate consequence thereof, it is not necessary for him to show that the falsehood was the sole inducement to his action, nor even the predominant motive. It is enough that the falsehood had a material influence upon him, although it operated in connection with other motives or inducements.⁶²

459. Functions of Court and Jury. The rule upon this subject has been laid down as follows: ⁶³ "Most of the questions involved in an action for deceit are questions of fact for the jury. Whether the defendant made the alleged false representation, and whether, if he made it, he knew it to be false, and whether the plaintiff was ignorant of its falsity, and whether he relied upon it, and was thereby damaged, are undoubtedly questions of fact for the jury. But, assuming all these facts to be proved, the materiality of the representation is a question of law for the court." Applying the rule to the facts of the case then before the court, it was held that the false statement by the defendant, that as agent of the company, whose stock he was offering to the plaintiff, he had sold several hundred shares to specified persons for the price which he named to the plaintiff, and which the latter paid, was a material statement of fact and legally sufficient to maintain the suit, if the other elements of fraud were proved.

460. False Statement by Agent or Servant. Whether an action of deceit will lie against a morally innocent principal, whose agent or servant has fraudulently deceived the plaintiff, has been much discussed. Some judges have held that, as conscious wrongdoing on the part of the defendant is of the essence of the tort of deceit, the action is not maintainable against a principal who has not authorized or ratified the agent's falsehood, and who is not morally culpable with respect to it. The victim may sue the agent for

⁶². *Tatton v. Wade*, 18 C. B. 371, 25 L. J. C. P. 240 (1856); *Matthews v. Bliss*, 22 Pick. (39 Mass.) 48 (1839); *Light v. Jacobs*, 183 Mass. 206, 66 N. E. 799 (1903); *Morgan v. Skiddy*, 62 N. Y. 319 (1875); *Handy v. Waldron*, 19 R. I. 618, 35 At. 884, 49 Am. St. R. 794 (1896). ⁶³. *Caswell v. Hunton*, 87 Me. 277, 32 At. 899 (1895); *Polland v. Brownell*, 131 Mass. 138 (1881); *Powers v. Fowler*, 157 Mass. 318, 32 N. E. 166 (1892); *Estell v. Myers*, 54 Miss. 174, 185 (1876); accord, *Davis v. Davis*, 97 Mich. 419, 56 N. W. 774 (1893), holds that the materiality is for the jury.

deceit, say the judges, but his remedies at law against the principal are limited to the rescission of any contract induced by it, and the recovery of any money paid, or property transferred to the principal, or of which he has had the benefit.⁶⁴

461. The prevailing view is, however, that the principal is liable for the deceit of his agent or servant, as he is for any other tort of such representative. Provided the agent or servant made the false representation in the course of his employment,⁶⁵ the master is liable though he may not have authorized it, or known that it was made, or be morally responsible for it. Having put the agent or servant "in his place to do that class of acts, he must be answerable for the manner in which the representative has conducted himself in doing the business, which it was the act of the master to place him in."⁶⁶

§ 2. SLANDER OF TITLE.

462. **Nature of the Tort.**^{66a} This wrong differs from Deceit in that the falsehood is intended not to induce the plaintiff to act to

⁶⁴. *Udell v. Atherton*, 7 H. & N. E. 14, 23 Am. St. R. 809 (1890); 172, 30 L. J. Ex. 337 (1861); *Western Busch v. Wilcox*, 82 Mich. 336, 47 N. Bank of Scotland v. Addie, L. R. 1 W. 328, 21 Am. St. R. 563 (1890); H. L. Sc. 145 (1867); *Kennedy v. McKay*, 43 N. J. L. 288 (1881). *N. Y. Imp. Co. v. Chapman*, 118 N. Y. 288, 23 N. E. 187 (1890); *Chester*

⁶⁵. *Taylor v. Commercial Bank*, 174 N. Y. 181, 66 N. E. 726, 95 Am. St. R. 564 (1903), holding that a bank cashier is not acting within the scope of his authority in making a representation as to a customer's solvency. *v. Dickerson*, 54 N. Y. 1 (1873); *Brundage v. Mellon*, 5 N. D. 72, 63 N. W. 209 (1895); *Peckham Iron Co. v. Harper*, 41 O. St. 100 (1884); *Erie City Iron Works v. Barber*, 106 Pa. 125 (1884).

⁶⁶. *Barwick v. Eng. Joint Stock Bk.*, L. R. 2 Ex. 265, 36 L. J. Ex. 147 (1867); *Swire v. Francis*, 3 App. Cas. 113, 47 L. J. P. C. 18 (1877); *Strang v. Bradner*, 114 U. S. 555, 5 Sup. Ct. 1038, 29 L. Ed. 248 (1884); *Hindman v. 1st Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623 (1902); *Am. Nat. Bk. v. Hammond*, 25 Col. 367, 55 Pac. 1090 (1898); *Weeler v. Baars*, 33 Fla. 696, 15 So. 584 (1894); *Rhoda v. Annis*, 75 Me. 17, 46 Am. R. 354 (1883); *Haskell v. Starbird*, 152 Mass. 117, 25 N. In *Downey v. Finucane*, 205 N. Y. 251, 98 N. E. 391, 40 L. R. A., N. S. 307 (1912), the promoters of a company were held liable in damages for the fraud of an agent, without reference to their own moral guilt or innocence.

^{66a}. In *Rhoades v. Bugg*, 148 Mo. App. 707, 129 S. W. 38 (1910), it was held that an action for slander of title would not lie, where no language was used by defendant concerning plaintiff's title, and that the action

his harm, but to induce third persons to refrain from buying the plaintiff's property or from patronizing his business. It takes its name from the form which it most frequently assumed in early English law, that of slandering the plaintiff's title to goods⁶⁷ or to land,⁶⁸ for the purpose of preventing his sale of them. At present, however, it assumes a variety of forms and may be said to consist in the publication of false statements, disparaging the title or property interests of the plaintiff, with the intention of causing him damage and resulting in actual damage to him.⁶⁹

The name is not a fortunate one, and has operated at times to confuse counsel and courts.^{69a} It might well be exchanged for the term "Disparagement of Property,"^{69b} but there is little probability of accomplishing such exchange.^{69c}

463. Falsity and Malice. These are not to be inferred from the fact of publication, as they are in the case of personal defamation,⁷⁰ but must be established by evidence.⁷¹ There is some

could not be converted into an action on the case.

67. In the Court Baron (Selden Soc. Pub., vol. 4), at p. 130 (1320)), judgment is noted against "Alice Balle (3 d.) for that she defamed the lord's corn, whereby the other purchasers forebore to buy the lord's corn, to the lord's damage." At p. 136 (1323), "It is found by inquest that John Curteys and John Cordhant have slandered the hedge of Hugh Seld in the fen, whereby the said Hugh has lost the sale of the said hedge to his damage at 2s."

68. Mildmay's Case, 1 Coke 177b. (1584); Gerrard v. Dickenson, Cro. Eliz. 196 (1589); Pennyman v. Rabbanks, Cro. Eliz. 427 (1596).

69. Pater v. Baker, 3 C. B. 868, 16 L. J. C. P. 124, 32 E. C. L. 161 (1847); Burkett v. Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. R. 151 (1891); Webb v. Cecil, 9 B. Mon. (48 Ky.) 198, 48 Am. Dec. 423 (1848); Kendall v. Stone, 5 N. Y. 15, 18 (1851); Wier v. Allen, 51 N. H. 177 (1871);

false statement that a breeding stallion was diseased; Paull v. Halferty, 63 Pa. 46 (1869), false assertion that ore in plaintiff's land would soon run out; Ratcliffe v. Evans, (1892) 2 Q. B. 524, 61 L. J. Q. B. 535, false statement that plaintiff had ceased to carry on his business.

69a. See cases in the notes to the next following paragraph.

69b. Articles under this title, by Judge Jeremiah Smith, 13 Columbia Law Rev. 13 and 121 (1913).

69c. McDonald v. Green, 176 Mass. 113, 57 N. E. 211 (1900), construing Mass. statute.

70. Supra, Chap. X. But the complaint need not set out words, used by the defendant, that are actionable. It is enough that the defendant's conduct intimidated customers from buying plaintiffs' goods by threats of prosecution; McElwee v. Blackwell, 94 N. C. 261 (1886).

71. Hatchard v. Mege, 18 Q. B. D. 771, 56 L. J. Q. B. 397 (1887); Stew-

authority for the proposition that one, who disparages the title of another to his damage, is liable therefor, although he did not intend any injury;⁷² but this view appears to have originated in the disposition of certain judges to treat slander of title as a species of personal defamation, and has long been thoroughly discredited.⁷³

464. There is also some authority for the proposition that a rival trader is guilty of slandering the title, whenever he disparages the property of his competitors, by false assertions of the superiority of his own.⁷⁴ Most courts, however, have repudiated this doctrine on the ground that it "would open a very wide door to litigation, and might expose every man, who said his goods were better than another's, to the risk of an action."⁷⁵ Dealing with a case of this character, Lord Chancellor Herschell wisely remarked: "That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The court would then be bound to inquire, in an action brought, whether this ointment, or this pill, better cured the disease which it was alleged to cure — whether a particular article of food was in this respect, or that, better than another. Indeed, the courts of law would be turned into a machinery for advertising rival productions, by obtaining a judicial determination which of the two was the better."⁷⁶

465. **Rival Claimants to Property.** Where the false statement in disparagement of the plaintiff's title is made by one, who be-

ard v. Young, L. R. 5 C. P. 122, 39 Mich. 476, 67 N. W. 527 (1896); An-
L. J. C. P. 85 (1870); McDaniel v. drew v. Deshler, 45 N. J. L. 167
Baca, 2 Cal. 326, 56 Am. Dec. 339 (1883); Hovey v. Rubber Tip Co.,
(1852); Cardon v. McCormall, 120 57 N. Y. 119, 15 Am. R. 470 (1874);
N. C. 461, 37 S. E. 109 (1897). Hopkins v. Drowne, 21 R. I. 20, 41

72. Ross v. Pynes, 3 Call. (5 Va.) At. 567 (1898).
568, Wythe 69 (1790), "R. though 74. Western Counties Co. v.
he is believed not to have designed Lawes Chem. Co., L. R. 9 Ex. 218,
any injury, ought to make repara- 43 L. J. Ex. 171 (1874).
tion for the loss."

73. Pitt v. Donovan, 1 M. & S. 639, 13 L. J. Q. B. 130 (1843); Tobias v.
14 R. R. 535 (1813); Pater v. Baker, Harland, 4 Wend. (N. Y.) 537, 541
3 C. B. 868, 16 L. J. C. P. 124, 32 (1830); Johnson v. Hitchcock, 15
E. C. L. 161 (1847); Hill v. Ward, John (N. Y.) 185 (1818).
13 Al. 310 (1848); Walkley v. Bost- 76. White v. Mellen, (1895) App.
wick, 49 Mich. 374, 13 N. W. 780 Cases, 154, 165, 64 L. J. Ch. 308.
(1882); Harrison v. Howe, 109

believes in good faith that he has a lawful claim upon the property in question, the occasion is privileged, and he is not liable for the damage which his misrepresentation causes to the plaintiff.⁷⁷ If, however, his claim is a sham, and his falsehood is intended to injure the plaintiff and not to benefit his own legitimate interests, he is liable.⁷⁸ While actual malice on the part of the defendant must be shown,⁷⁹ it is not necessary to give direct proof of an intention to impair the value of the property. It is enough to show (at least to take the case to the jury on the question of fraudulent intention) that the defendant's false statements were recklessly uttered, in disregard of the plaintiff's rights.⁸⁰

466. Slander of Title and Damage. The rule has long been settled that "in the action for slander of title, there must be an express allegation of some particular damage resulting to the plaintiff from such slander."⁸¹ Accordingly, if the plaintiff makes no such allegation, or, having made it, fails to prove some particular damage which is the proximate result of the slander, he must fail in his suit.⁸² Nor will it avail him to aver that the statement com-

77. *Hill v. Ward*, 13 Al. 310 (1848); *McDaniel v. Baca*, 2 Cal. (1902).

326, 56 Am. Dec. 339 (1852); *Everett Plano Co. v. Brent*, 60 Ill. App. 372 (1895); *Stark v. Chetwood*, 5 Kan. 141 (1869); *Duncan v. Griswold*, 92 Ky. 546, 18 S. W. 354 (1892); *Gent v. Lynch*, 23 Md. 58, 87 Am. Dec. 558 (1865); *Swan v. Tappan*, 5 Cush. (59 Mass.) 104 (1849); *John C. Lovell Co. v. Houghton*, 116 N. Y. 520, 23 N. E. 1066, 6 L. R. A. 363 (1889); *Feiten v. Milwaukee*, 47 Wis. 494, 2 N. W. 1148 (1879).

78. *Walden v. Peters*, 2 Rob. (La.) 331, 38 Am. Dec. 213, (1842); *Chesebro v. Powers*, 78 Mich. 472, 44 N. W. 290 (1889); *Gore v. Condon*, 87 Md. 368, 739, 39 At. 1042, 46 L. R. A. 382, 67 Am. St. R. 352 (1898).

79. *Andrew v. Deshler*, 45 N. J. L. 167 (1883); *Squires v. Wason*

Mfg. Co., 182 Mass. 137, 65 N. E. 32 (1848); *McDaniel v. Baca*, 2 Cal. (1902).

80. *McDaniel v. Baca*, 2 Cal. 326, 56 Am. Dec. 339 (1852); *Gott v. Pulsifer*, 122 Mass. 235, 23 Am. R. 332 (1877).

81. *Malachy v. Soper*, 3 Bing. N. C. 371, 3 Scott 373 (1836); *Ratcliffe v. Evans* (1892), 2 Q. B. 524, 532, 61 L. J. Q. B. 535, "The necessity of alleging and proving actual temporal loss, with certainty and precision, in all cases of this sort, has been insisted upon for centuries.

But it is an ancient and established rule of pleading, that the question of generality of pleading must depend upon the subject matter."

82. *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707 and note, 25 Am. St. R. 151 (1891);

Dooling v. Budget Pub. Co., 144 Mass. 258, 10 N. E. 809, 59 Am. R.

plained of was "false, scandalous, malicious and defamatory."⁸² These are but epithets, and the law requires the plaintiff to show, in what respect he has been actually harmed, by the defendant's disparagement of his property.

On the other hand, the plaintiff does not make out his cause of action by showing damage, without also showing some disparagement of his title or property interests by spoken or written words.^{82a}

§ 3. UNFAIR COMPETITION.

467. The Term Is Modern. In a leading English case, the opinion was expressed that "to draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts." But the learned judge, who expressed that opinion, was careful to limit it to "mere competition; for I have no doubt," he added, "that it is unlawful and actionable for one man to interfere with another's trade by fraud or misrepresentation."⁸⁴ It is interference of this exceptional character that has come to be characterized as "unfair competition."

The term is quite modern. Sir Frederick Pollock assures us that it "is hardly known as yet in English courts."⁸⁵ During

⁸³ (1887); *Wilson v. Dubois*, 35 Minn. 471, 29 N. W. 68 (1886);

Haney Mfg. Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073 (1889); *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310 (1902).

In *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703 (1888), the allegations of falsity, malice and special damage were admitted by the demurrer.

⁸² *Evans v. Harlow*, 5 Q. B. 624, 13 L. J. Q. B. 130 (1843); *White v. Mellen* (1895), App. Cas. 154, 64 L. J. Ch. 308.

^{82a} *Rhoades v. Bugg*, 148 Mo. App. 707, 129 S. W. 38 (1910). The disparagement in this case was by driving stakes on plaintiff's land as

an assertion of title to plaintiff's property.

⁸⁴ *Fry, L. J.*, in *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 626, 58 L. J. Q. B. 465 (1898).

⁸⁵ *Law of Torts* (6 Ed. 1901) 307, (9 Ed.) 322. There is no reference to the term in the first edition of this work. In the last edition of Kerr, on *Fraud and Mistake* (1910),

it is used at p. 411, but the cases cited, one of them as late as 1908, do not employ the term. A very interesting article on "The New German Law of Unfair Competition" appeared in the *Law Quarterly Rev.*, p. 156, Vol. 13, (London, 1897).

the last quarter of a century it has come into very general use among judges,⁸⁶ and writers upon legal topics, in this country.⁸⁷

468. The Nature of This Tort. As a wrong, remediable in a common law action for damages, unfair competition consists in intentionally inducing third persons to buy the defendant's property or patronize his business, by false representations that the property or the business is that of the plaintiff.⁸⁸ In equity, the term may be even broader, including conduct of the defendant which is unjustifiably harmful to the plaintiff, but which is not intentionally dishonest.⁸⁹ We shall not undertake to discuss, here, the equity side of this subject, as we are dealing with a branch of the common law, and not with equity jurisdiction. If the learned reader would pursue further his investigations of this rapidly expanding topic he is referred to treatises on Trade Marks, Trade Names, and Unfair Trade.

469. The tort, now under consideration, is frequently, indeed most commonly brought before the courts, in connection with a claim for the infringement of a trade-mark, but the two are quite distinct. When the plaintiff shows that he has an absolute right to the use of a particular word or words as a trade-mark, an infringement of that right is an invasion of his right of property, without regard to the intention of the infringer. Accordingly, he

⁸⁶ *Lawrence Mfg. Co. v. Tenn. Competition in Business*, 5 Harv. Mfg. Co., 138 U. S. 537, 549, 11 Sup. Ct. 396, 34 L. Ed. 997 (1890); *Gray v. Taper-Sleeve Pulley Works*, 16 Fed. 436 (1883), "Their complaint is against what they assert to be unfair competition;" *Hostetter Co. v. Martinoni*, 110 Fed. 524 (1901); *Sterling Remedy Co. v. Spermine Med. Co.*, 112 Fed. 1000 (1901); *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. 357, 366 (1902); *Kyle v. Perfect Mattress Co.*, 127 Al. 39, 28 So. 545, 85 Am. St. R. 78 (1899).

⁸⁷ "Certain cases analogous to Trade Marks," 4 Harv. Law Rev. 321 (1891); "Prevention of Unfair Competition," 10 Harv. L. R. 275 (1896); "Unfair Competition in Trade," note in 30 C. C. A. Reports, 376 (1898); Hopkins, *Law of Unfair Trade*, (Chicago, 1900).

⁸⁸ *Sykes v. Sykes*, 3 B. & C. 541, 5 D. & R. 292, 3 L. J. K. B. 46 (1824); *Marsh v. Billings*, 7 Cush. (61 Mass.) 322 (1852); *Standard Paint Co. v. Trinidad Asphalt Co.*, 220 U. S. 446, 453, 31 Sup. Ct. 456 (1911).

⁸⁹ *Orr, Ewing & Co. v. Johnston & Co.*, 40 L. T. N. S. 307 (1879); *Vulcan v. Myers*, 139 N. Y. 364, 368, 34 N. E. 904 (1893).

is entitled to at least nominal damages in a suit at law,⁹⁰ and to an injunction in equity against the further violation of his right of property.⁹¹ "But where the alleged trade-mark is not in itself a good trade-mark, yet the use of the word has come to denote a particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded, by requiring the use of the word by another to be confined to its primary sense, by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases, such circumstances must be made out as will show wrongful intent in fact, or justify that inference, from the inevitable consequences of the act complained of."⁹²

470. Infringement of Trade-Marks. When the plaintiff brings his action for violation of his right of property in a trade-mark or trade name, he is required to show that he has acquired an exclusive right to its use. In order to show this he must prove⁹³ that the "name, device or symbol was adopted for the purpose of identifying the origin or ownership of the article to which it is attached," or the business with which it is associated; or "that it points distinctly, either by itself or by association, to the origin, manufacture or ownership of the article on which it is stamped. It must also appear to be designed, as its primary object and purpose, to indi-

90. *Blofield v. Payne*, 4 B. & Ad. Sup. Ct. 270, 45 L. Ed. 365 (1900).
91. *Thomson v. Winchester*, 19 Pick. (36 Mass.) 214 (1837); *Morison v. Salmon*, 2 M. & G. 385, 2 Scott 449 (1841); *Rodgers v. Nowill*, 5 C. B. 109, 17 L. J. C. P. 52 (1847); *Coffeen v. Brunton*, 4 McLean (U. S. C. C.) 516 (1849); *Marsh v. Billings*, 7 Cush. (61 Mass.) 322 (1852).

92. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828 (1877); *Lawrence Mfg. Co. v. Tenn. Mfg. Co.*, 138 U. S. 537, 549, 11 Sup. Ct. 396, 34 L. Ed. 997 (1890); *W. R. Lynn Shoe Co. v. The Auburn-Lynn Shoe Co.*, 100 Me. 461, 62 At. 499, 4 L. R. A. N. S. 960 (1905).

93. *Elgin Nat. Watch Co. v. Ill. Watch Co.*, 179 U. S. 665, 675, 21 Sup. Ct. 669 (1911), same holding.

cate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others." He must also establish his priority of appropriation of the name, symbol or device; that is to say, he must "have been the first to use or employ the same on like articles of production."⁹⁴ "If the device, mark or symbol was adopted or placed upon the article for the purpose of identifying its class, grade, style or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark."⁹⁵ Such trade-mark cannot consist of words in common use as designating locality, section or region of country," or of an ordinary surname,⁹⁶ unless these have been combined in an original device,^{96a} or have come to be applied exclusively to a product made at a particular place and not to the place itself.^{96b}

471. It is not necessary to the validity of a trade-mark that it be registered, even in a jurisdiction where there is statutory provision for registration. "Property in trade-marks does not derive its existence from an act of Congress,"⁹⁷ nor from any other legislative act,⁹⁸ in this country. In England, however, "The right to

94. *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170 (1865); *Hyman v. Larabee v. Lewis*, 67 Ga. Solis Cigar Co., 4 Col. App. 475, 36 Pac. 444 (1894); *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526 (1888); *George v. Smith*, 52 Fed. 830 (1892); *Ayer v. Rushton*, 7 Daly (N. Y.) 9 (1877); *Schneider v. Williams*, 44 N. J. Eq. 391, 14 At. 812 (1888). "Three things are requisite to the acquisition of a trade-mark. First, the person desiring to acquire the title must adopt some mark not in use to distinguish goods of the same class or kind, already on the market, belonging to another trader. Second, he must apply his mark to some article of traffic. Third, he must put his article marked with his mark on the market."

95. *Oakes v. Candy Co.*, 146 Mo. 391, 48 S. W. 467 (1898); *Spieker v. Lash*, 102 Cal. 38, 36 Pac. 362 (1894); *Siegel*, 116 Ill. 137, 4 N. E. 667, 56 Am. R. 766 (1886); *C. F. Simmons Med. Co. v. Mansfield Co.*, 93 Tenn. 84, 23 S. W. 165 (1893).

96. *Glendon Iron Co. v. Uhler*, 75 Pa. 467, 15 Am. R. 599 (1874); *Brown Chem. Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247 (1891).

96a. *W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.*, 100 Me. 461, 62 At. 499, 4 L. R. A. N. S. 960 (1905).

96b. *Baglin v. Cusenier Co.*, 221 U. S. 580, 31 Sup. Ct. 669 (1911).

97. *LaCroix v. May*, 15 Fed. 236 (1883), quoting from *Trade-Mark Cases*, 100 U. S. 82, 92, 25 L. Ed. 550 (1879).

98. *Oakes v. Candy Co.*, 146 Mo. 391, 48 S. W. 467 (1898); the

trade-marks now mainly depends upon statutes,"⁹⁹ and no person is entitled to institute proceedings to prevent, or to recover damages, for the infringement of a trade-mark, capable of being registered under the statutes, unless it has been duly registered.

When a valid trade-mark exists, "it is a property right for the violation of which damages may be recovered in an action at law, and the continued violation of it will be enjoined by a court of equity, with compensation for past infringement."¹⁰⁰ In the language of another court, "while competition is essential to the life of commerce, and is the consumer's certain defense against extortion, it should be fair and honest; and the manufacturer who produces an article of recognized excellence in the market, and stamps it with the insignia of his industry, integrity and skill, makes his trade-mark a part of his capital in business, and thus acquires a property right in it, which a court of equity will protect against all forms of commercial piracy."¹

472. Words, Symbols, and Devices Which Are Not Trade Marks. To these a person cannot acquire a right to exclusive

opposite doctrine in *Whittier v. Lehner v. Eisner & Mendelson Co.*, Dietz, 66 Cal. 78 (1884), has been nullified by Sec. 3199 of the Political Code enacted in 1885. In *Hennessey v. Braunschweiler & Co.*, 89 Fed. 665, 668 (1898), it is said, "Registration under the act of Congress is of but little, if any, value except for the purpose of creating a permanent record of the date of adoption and use of the trade-mark, or in cases where it is necessary to give jurisdiction to the Federal courts."

⁹⁹ Clerk & Lindsell, *Torts* (2 Ed.) 625, referring to 46 & 47 Vict., Ch. 57; and 51 and 52 Vict., Ch. 50.

¹⁰⁰ *Trade-Mark Cases*, 100 U. S. 82, 92, 25 L. Ed. 550 (1879); *Bradley v. Norton*, 33 Conn. 157, 87 Am. Dec. 200 (1865).

1. *Vulcan v. Myers*, 139 N. Y. 364, 34 N. E. 904 (1893); *Blackwell v. Wright*, 73 N. C. 310 (1875); *Sax-*

179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60 (1900); *Kyle v. Perfect Mattress Co.*, 127 Al. 39, 28 So. 545, 85 Am. St. R. 78, with valuable note (1900); *Burt v. Tucker*, 178 Mass. 493, 59 N. E. 1111, 52 L. R. A. 112, 86 Am. St. R. 499 (1901); *Regis v. J. A. Jayne & Co.*, 185 Mass. 458, 70 N. E. 480 (1904), "If at common law, an action for damages caused to a manufacturer whose goods were put upon the market under a trade-mark and had acquired a distinctive value and reputation, could be maintained against another trader, who fraudulently copies and places upon the goods made by him a similar mark or label, in equity, relief can be granted not only as to damages already suffered, but an injunction can be awarded restraining such unlawful use in the future."

use, in the nature of a property right, no matter how long, or how widely, he has employed them, in connection with his property or his business. "But it is nevertheless true that even without any strict proprietary interest, as a trade-mark, in the terms or device employed, a party is entitled to protection against the unfair use of them by another, in the effort to take away from him the trade or custom which he has built up."² Anyone who uses such terms or devices, not for the honest purpose of fair competition with a business rival, but for the purpose of palming off his goods or representing his business as the goods or the business of that rival, in the hope of finding "more profit and less trouble in trading on another man's reputation than on his own,"³ perpetrates a fraud, and is liable in damages to the rival who is injured by such unfair competition.⁴

The same doctrine is applicable to one who puts on the market an article which simulates one upon which the patent has expired.^{4a}

2. *Draper v. Skerrett*, 116 Fed. 206 (1902), holding that "French Tissue" was not a valid trade-mark, but that defendant's imitation of plaintiff's symbols, devices and display, was intended to deceive the public into buying defendant's emollient paper for plaintiff's.

3. Lord Macnaghton in *Reddaway v. Banham*, (1896) App. Cas. 199, 217, 65 L. J. Q. B. 381. In this case, "Camel Hair Belting" was held not a valid trade-mark because not a fanciful term but fairly descriptive of the material used in the belting, but its use by the defendant was fraudulent; *William Wrigley, Jr., Co. v. Grove Co.*, 183 Fed. 99, 105 C. C. A. 391 (1910), "Spearmint" as applied to shewing gum is not a valid trade-mark; *Standard Paint Co. v. Trinidad Asphalt Co.*, 220 U. S. 446, 31 Sup. Ct. 456 (1911), "Rub-

beroid" is descriptive and hence not available as a trade-mark.

4. *Reddaway v. Banham*, supra, "The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader;" *Sterling Remedy Co. v. Gory*, 110 Fed. 372 (1901).

"Unless the defendant intended to infringe upon the rights of the complainant, he has gone to extraordinary pains in imitating the package of the complainant for no purpose," *Sterling Rem. Co. v. Spermine Med. Co.*, 112 Fed. 1000, 50 C. C. A. 657 (1901). "There was here manifest attempt to put upon the public the goods of the defendant, as those of the complainant."

4a. *Westcott Chuck Co. v. Onelda Nat. Chuck Co.*, 199 N. Y. 247, 92 N. E. 639 (1910), reversing 133 App. Div. 937, 118 N. Y. Supp. 1149 (1909).

473. Deceit is the basis of a suit brought to redress this wrong,⁵ whether it takes the form of a common-law action for damages, or a suit in equity for an injunction as well as for pecuniary compensation. Accordingly, if the plaintiff fails to make out a clear case of deceitful representation or perfidious dealing, either by direct or circumstantial evidence, he cannot recover.⁶ Where deception is the natural result of the defendant's simulation of the plaintiff's labels or other devices, however, positive proof of fraudulent intent need not be proved.⁷

474. The Fraudulent Use of a Proper or Corporate Name. While the law does not permit a natural or artificial person to convert his name into a trade-mark, and thus monopolize its use, even in a particular business,⁸ it does protect him against the fraudulent employment of the same name by another, however valid may

5. *Allen B. Wrisley Co. v. Iowa Soap Co.*, 122 Fed. 796, 59 C. C. A. 54 (1903), holding that "one who so names and addresses his product that a purchaser, who exercises ordinary care to ascertain the sources of its manufacture, can readily learn that fact by a reasonable examination of the boxes or wrappers that cover it, has fairly discharged his duty to the public, and to his rivals, and is guiltless of that deceit which is an indispensable element of unfair competition."

6. *Lawrence Mfg. Co. v. Tenn. Co.*, 138 U. S. 537, 551, 11 Sup. Ct. 396, 34 L. Ed. 1005 (1891), the letters "L. L." did not constitute a valid trade-mark, and the defendant's brand was entirely dissimilar in appearance to the plaintiff's; *French Republic v. Saratoga Vichy Co.*, 191 U. S. 427, 24 Sup. Ct. 145, 49 L. Ed. 247 (1903). "The essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and it is only when this false representation is directly or indirectly made, that the party who appeals to the court

of equity can have relief. Applying this doctrine to the case under consideration, we are clearly of the opinion that there is no such similarity in the labels as at present used, and that there is no such fraud shown in the conduct of the defendant, as would authorize us to say that the plaintiffs are entitled to relief;" *Postum Cereal Co. v. Health Food Co.*, 113 Fed. 848, 56 C. C. A. 360 (1902), name and package so dissimilar as not to mislead; *Barrett Chem. Co. v. Stern*, 176 N. Y. 27, 68 N. E. 65 (1903).

7. *Am. Wal. Watch Co. v. U. S. Watch Co.*, 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. R. 263 (1899); *Wirtz v. Eagle Bottling Co.*, 50 N. J. Eq. 164, 24 At. 653 (1892); *Drake Med. Co. v. Glessner*, 68 O. St. 337, 358, 67 N. E. 722 (1903).

8. *Robinson v. Storm*, 103 Tenn. 40, 52 S. W. 880 (1899). "The law is settled that no one can acquire the right of a trade-mark, either in his own name or in that of another person, so as to exclude one of the same name from using it to iden-

be the other's right to the name.^{8a} The following statement of the principle, taken from a decision of the United States Supreme Court, is in accord with the views which generally prevail, both in England, and in this country: "Every one has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case, the inconvenience or loss to which those having a common right are subjected, is *damnum absque injuria*. But although he may thus use his name, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name. Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, in itself amounts to an artifice calculated to produce the deception alluded to in the foregoing adjudications. Indeed the enforcement of the right of the public to use a generic name, dedicated as the results of monopoly, has always, where the facts required it, gone hand in hand with the necessary regulation, to make it accord with the private property of others, and the requirements of public policy. The courts have always, in every case without exception, treated the one as the co-relative or resultant of the other."⁹

tify goods which he sees proper to put upon the market, so long as in doing so the latter perpetrates no fraud thereby, or is guilty of no unfair artifice."

8a. *Butler v. State*, 127 Ga. 700, 56 S. E. 1000 (1907), applying a State statute, making such fraudulent use of a name a misdemeanor.

9. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 187, 16 Sup. Ct. 1002, 41 L. Ed. 118 (1896); *Stuart v. F. G. Stewart Co.*, 33 C. C. A. 484, 91 Fed. 247, 63 U. S. App. 561 (1889); *Russia Cement Co. v. Le Page*, 147 Mass. 206, 17 N. E. 304 (1888); *Higgins Co. v. Higgins*

Soap Co., 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. R. 769 (1895); *Montgomery v. Thompson*, (1891) App. Cas. 217, 60 L. J. Ch. 757; *Yyckoff v. Howe Scale Co.*, 110 Fed. 521 (1901), "That all persons have respectively the right to use their own names in their own business, is entirely clear; but this right is subject to the limitation, common to all rights, that it is to be so used as not to injure the rights of others." Hence persons named Remington were enjoined from making and selling typewriters as "Remington-Sholes" typewriters, on the ground that it "would make

475. As intimated in the foregoing paragraph, a corporation cannot monopolize the name which it assumes, upon its organization. If, however, it has built up a business and gained a reputation which goes with that name, such priority of use may put another corporation, which selects the same name, to a disadvantage. The newcomer into the field of competition must not palm off its goods, as those of the old and well known corporation.¹⁰ "Courts demand a high order of commercial integrity, in the use by competitors of a name under which a rival has gained a business reputation, whether that name is strictly a trade-mark or is descriptive of quality merely; and frown upon all filching attempts to obtain the reputation of another."¹¹ Hence, it does not matter that the name of the newcomer is not precisely that of the established corporation. Indeed, "similarity and not identity is the usual recourse, when one party seeks to benefit himself by the good name of another."¹²

476. **Imitating Packages and Buildings.** Unfair trade consists, oftentimes, in imitating the bottles or packages, in which a rival

confusion in the plaintiff's trade, and tend to pass off the new machines for the regular Remington machines of the plaintiff;" reversed in 198 U. S. 119, 25 Sup. Ct. 609 (1905), on the ground that the Remingtons and Sholes made a reasonable and fair use of their names in adopting the name "Remington-Sholes" for their machine, and in giving that name to the corporation formed for its manufacture and sale. They did not choose the complainant's name literally, or so closely that those using ordinary discrimination would confuse the identity of the two names, and that differentiation is sufficient to relieve them of any imputation of fraud. Cf. *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 208 U. S. 554, 28 Sup. Ct. 350 (1908).

10. *Am. Wal. Watch Co. v. U. S. Watch Co.*, 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 72 Am. St. R.

263 (1899); *Elgin Nat. Watch Co. v. Ill. Watch Case Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365 (1900).

11. *Hostetter Co. v. Martinoni*, 110 Fed. 524, 525 (1901); *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 470, 27 L. R. A. 42, 43 Am. St. R. 769 (1895).

12. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 94 (1887); *Peck Bros. & Co. v. Peck Bros. Co.*, 113 Fed. 291, 51 C. C. A. 251 (1902); *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. 357 (1902); *International Silver Co. v. Wm. H. Rogers Corporation*, 67 N. J. Eq. 646, 60 At. 187 (1905); *International Silver Co. v. Rogers*, 71 N. J. Eq. 560, 63 At. 977 (1906), no simulation or fraud in the latter case; *Regent Shoe Mfg. Co. v. Haaker*, 75 Neb. 426, 106 N. W. 595, 4 L. R. A., N. S. 447 (1906).

manufacturer or dealer of established reputation puts up his goods; ¹³ or the livery, or insignia worn by the servants, or agents of one conducting a particular business.¹⁴ It has even resorted to the erection of a duplicate building alongside the mercantile house of a successful trader.¹⁵ But however protean its forms, or ingenious its tricks may be, it falls under the condemnation of the law, whenever the plaintiff can convince the proper tribunal, that its object is to induce the public to patronize the defendant, under the mistaken supposition, that it is patronizing the plaintiff.

477. False and Misleading Trade Marks. When a person seeks an injunction or damages against one who has hurt his business by making false representations to the public, it is essential that he should not, in his trade-mark, or trade name, or in his advertisements or descriptions of his goods or business, be himself guilty of any false or misleading representations. A court will not protect him against a competitor, however unfair, if he is engaged in deceiving and defrauding the public. In such a case it does not

13. Van Hoboken v. Mohns, 112 Fed. 528 (1901), gin put up in bottles of distinctive color, size and shape; Centaur Co. v. Neathery, 91 Fed. 891, 34 C. C. A. 118 (1899); Centaur Co. v. Link, 62 N. J. Eq. 147, 49 At. 828 (1901), "In the present case, notwithstanding the difference in the printed matter on the labels, I am unable to resist the conclusion that the size and the shape of the bottles, and the color and form of the label were selected by the defendants for the purpose of leading some purchasers to take their compound, under the supposition that they were getting what they had always got, namely the medicine made by the complainant." Robinson v. Storm, 103 Tenn. 40, 52 S. E. 880 (1899); Geo. G. Fox Co. v. Glynn, 191 Mass. 344, 78 N. E. 89, 9 L. R. A., N. S. 1096 (1906), peculiar size, shape and condition of surface of loaf of bread, with the word "Creamalt."

14. Knott v. Morgan, 2 Keen 213 (1836); Marsh v. Billings, 7 Cush. (61 Mass.) 322 (1851); Stone v. Carlan, 13 Law Reporter (N. Y.) 360 (1850).

15. Weinstock v. Marks, 109 Cal. 529, 42 Pac. 142, 50 Am. St. R. 57, 30 L. R. A. 182 (1895), "In its facts, we apprehend, no case like it can be found, either in this country or in England. * * * The fact that the question comes to us in an entirely new guise, and that the schemer had concocted a kind of deception heretofore unheard of in legal jurisprudence, is no reason why equity is either unwilling or unable to deal with him." Accordingly, the court commanded the defendant to distinguish his place of business from that in which plaintiff was carrying on his business, so as to sufficiently indicate to the public that it was a different place of business from the plaintiff's.

take into account the attitude of the defendant. It beats the plaintiff on the ground that the privilege of deceiving the public is not a legitimate subject of commerce; that one has no legal right to complain, that, by the fraudulent rivalry of others, his own fraudulent profits are diminished.¹⁶

478. But it is not every misstatement on the part of the plaintiff, in his trade-mark, or his advertisements, that will defeat him. He may claim for his wares qualities which they do not possess. In the case of medicines, he may exaggerate their curative qualities. Still, if his conduct does not transgress the limits of ordinary mercantile dealing,^{16a} and cannot fairly be characterized as fraudulent towards the public, he will be entitled to relief.¹⁷

16. *Worden v. Cal. Flg Syrup Co.*, 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282 (1902); *Manhattan Med. Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706 (1882); *Joseph v. Macowsky*, 96 Cal. 518, 31 Pac. 914, 19 L. R. A. 53 (1892); *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129 (1892).

16a. *Honehens v. Honehens*, 95 Md. 37, 51 At. 822 (1902), "Equity will not protect a trade-mark for a patent medicine, the statement on the label: 'The great smallpox and diphtheria cure and preventive. Cures the worst cases without marking, unless already scabbed,'—asserting a falsehood, and being designed to deceive the public."

17. *Marshall v. Ross*, L. R. 8 Eq. 651, 39 L. J. Ch. 225 (1869); *Samuel Bros. v. Hostetter Co.*, 118 Fed. 257, 55 C. C. A. 111 (1902). "Much of the evidence in the case, taken on behalf of the appellant, was for the purpose of showing that the appellee's preparation is a quack medicine and an alcoholic stimulant, and, therefore, not entitled to the protection of a court of equity. Upon the evidence in the case, this

contention cannot be sustained. The record contains the testimony of many physicians, who have prescribed the preparation in their practice for the ailments mentioned on the label. It is argued, that no one preparation can possibly be a remedy for the numerous and divers ills, for which the label declares this preparation to be adapted. The court will not attempt minute investigation of this field of inquiry. It is one upon which the experts differ. It is enough to advert to the fact that the preparation purports to be a general tonic, and, as such, efficacious in restoring strength to those weakened by various ailments; and that it has become widely known and largely manufactured and used, and that it has a commercial value. The argument that it is a quack medicine, and that it is injurious to the human system, and is contraindicated for some of the ailments which it purports to cure, comes with ill grace from those who imitate it, as closely as they may, without possessing a complete knowledge of its formula, and, by unfair trade, sell the simulated article as and for the genuine." *New-*

479. Abandonment and Laches. A person may lose his right to a valid trade-mark, or to words and devices analogous to a trade-mark, by voluntary abandonment; as, by dismissing a suit brought to restrain its use by others;¹⁸ or, by disuse for a considerable period.¹⁹ But abandonment is not established by evidence of temporary discontinuance of its use, or of failure to enforce the plaintiff's rights under it.²⁰ The intent accompanying the discontinuance is important, and if the jury or trial court finds that the plaintiff, during the period of discontinuance, intended to resume business and the use of the trade-mark or name, abandonment is negated.²¹ "Simple laches, without more," it is said in a recent carefully considered decision,²² "is not sufficient to interfere with a complainant's right to injunctive relief, though it may affect his right to damages for past infringement." In the case then before the court a delay of nearly six years was held not to defeat the complainant's right to damages for past infringement.

The United States Supreme Court has declared that "the loss of the right of property in trade-marks upon the ground of abandonment is not to be viewed as a penalty either for non-user or for the creation and use of new devices. There must be found an *intent to abandon*."²³

bro v. Undeland, 69 Neb. 821, 96 N. W. 635 (1903); *Jacobs v. Beecham*, 221 U. S. 263, 272, 31 Sup. Ct. 555 (1910). "abandonment requires proof of non-user by the owner, or general surrender to the use of the public."

18. *Browne v. Freeman*, 12 W. R. 305, 4 N. R. 476 (1864).

19. *Blackwell v. Dibrell*, 3 Hughes (U. S. Cir. Ct.) 151, 14 Off. Gaz. 633 (1878).

20. *Taylor v. Carpenter*, 2 Wood & M. (U. S. C. C.) 1 (1846); *Chappell v. Sheard*, 2 K. & J. 117, 1 Jur. N. S. 996 (1855); *Lazenby v. White*, 41 L. J. Ch. 354 (1871); *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60 (1900).

21. *Burt v. Tucker*, 178 Mass. 493, 59 N. E. 1111, 54 L. R. A. 112, 86 Am. St. R. 499. In *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526 (1888), it is said that

22. *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. 357, 375 (1902), citing *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828 (1877), holding the plaintiff's delay so great as to forfeit his right to an account; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526 (1888), delay such as to preclude recovery of past damages; *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60 (1900), holding that laches as to bottle and label did not defeat plaintiff's right to injunction and damages.

23. *Baglin v. Cusenier Co.*, 221 U. S. 580, 597, 31 Sup. Ct. 669 (1911).

CHAPTER XIV.

NUISANCE.

§ 1. PRIVATE NUISANCE.

480. Definition. This tort consists in wrongfully disturbing one in the "reasonably comfortable use and enjoyment of his property,"¹ or in the enjoyment and exercise of a common right.² Particular conduct of the defendant may entitle the plaintiff to sue either for trespass or for nuisance.³ If he chooses the former action, the gist of his complaint is the defendant's wrongful disturbance of his possession. If he chooses the latter, the gist of his complaint is the discomfort caused him by the defendant.

According to Bracton, actionable nuisances, in his day, were confined to annoyances to freeholders in the enjoyment of their

1. *Lowe v. Prospect Hill Cem.*, 58 Neb. 94, 78 N. W. 488, 46 L. R. A. 237 (1899). Commissioners, 60 Ind. 511, 28 Am. R. 654 (1878), applying the following statutory definition, "Whatever

2. *Harrop v. Hirst*, L. R. 4 Ex. 43, 38 L. J. Ex. 1 (1868); *McCartney v. Londonderry & Co.*, (1904) App. Cas. 301, cases where a riparian owner took more water from a running stream than he was entitled to; *Lynn v. Hooper*, 93 Me. 46, 44 At. 127, 47 L. R. A. 752 (1899) and cases cited in the opinion; *Morton v. Moore*, 15 Gray (81 Mass.) 573, 576 (1860), "This right of the public confers upon every individual the privilege of traveling upon, using and enjoying a common highway for any and all lawful purposes, and consequently no one can be deprived of the enjoyment of such an easement by any adverse or unlawful use or occupation of the way by an individual for his private purposes"; *Haag v. Board of*

3. *Fay v. Prentice*, 1 C. B. 829, 14 L. J. C. P. 298 (1845), a cornice on defendant's building, which overhung plaintiff's garden. Blackstone speaks of such overhanging constructions as a species of trespass, 3 Comm. 217; *Miles v. Worcester*, 154 Mass. 511, 28 N. E. 676, 26 Am. St. R. 264, 13 L. R. A. 841 (1891).

property; ⁴ and Blackstone defines private nuisance as "anything done to the hurt or annoyance of the lands, tenements or hereditaments of another." ⁵ At present, as appears from the definition and authorities given above, the term has a more extended meaning, and is no longer limited to discomforts to freeholders.

Ordinarily the motive of the defendant is not material, in determining whether he is maintaining a nuisance. Under some modern statutes, however, structures erected by a person are a nuisance or are not, according to the purpose for which he put them up. ⁶

481. Legalizing Nuisances. Modern legislation frequently attempts to legalize that which at common law would be an actionable nuisance. In Britain, where Parliament is practically omnipotent, the validity of such legislation cannot be questioned. ⁷ In this country, the courts may be, and often are called upon to decide whether such statutes exceed the constitutional bounds of legislative authority. ⁸ Both there and here, such statutes are subjected to a strict construction. ⁹

4. *Le Legibus Angliæ*, Vol. 3, chs. 28, 43-46. In chapter 43, this author points out the distinction, then existing, between nuisances which are tortious and hurtful, and those which are hurtful, but not tortious.

5. *Commentaries*, Vol. 3, p. 216.

6. *Lovell v. Noyes*, 69 N. H. 263, 46 At. 25 (1898), applying the following statutory provision: "Any fence, or other structure in the nature of a fence, unnecessarily exceeding five feet in height, erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance. Any owner or occupant injured, either in his comfort, or the enjoyment of his estate, by such nuisance, may have an action of tort for the damage sustained thereby." Pub. St., c. 143, §§ 28, 29.

7. *London & Brighton Ry. v. Tru-*

man, 11 App. Cas. 45, 55 L. J. Ch. 354 (1895).

8. *Supra*, ¶ 50; *Western Granite Co. v. Knickerbocker*, 103 Cal. 111, 37 Pac. 192 (1894); *Beach v. Sterling Iron Co.*, 54 N. J. Eq. 65, 33 At. 286 (1895).

9. *Met. Asylum Dist. v. Hill*, 6 App. Cas. 193, 50 L. J. Q. B. 253 (1881); *Att'y Gen. v. Gaslight Co.*, 7 Ch. D. 217, 47 L. J. Ch. 534 (1877). In *Morton v. City of New York*, 140 N. Y. 207, 35 N. E. 490, 22 L. R. A. 241 (1893), it is said: "But the statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury";

Kobbe v. Village of New Brighton,

482. Turning Lawful Acts into Nuisances. Modern legislation also attempts to put under the ban of nuisance many a thing, which was perfectly justifiable at common law. Here, again, the inquiry is important, in this country, whether the legislation is constitutional.¹⁰ In a carefully considered case,¹¹ upon this subject, it is declared: "Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. A law enacted in the exercise of the police power must in fact be a police law. If it be a law for the promotion of the public health, it must be a health law, having some relation to the public health." A legislature is not omnipotent. Its declaration that a fact exists is futile, if the fact does not exist.^{11a}

483. Oftentimes, the declaration of a nuisance is found in the ordinance of a municipal corporation. In such cases, the further inquiry is to be made, has the legislature undertaken to confer upon the municipality in question authority to extend the list of nuisances, or only to prohibit those things which are nuisances at common law. If the authority is of the latter kind, any ordinance declaring that to be a nuisance, which was not such at common law, is invalid.¹² If the authority is of the former kind, the

48 N. Y. Supp. 990, 23 App. Div. 243 (1897); *Holmes v. City of Atlanta*, 113 Ga. 961, 39 S. E. 458 (1901). *Leiderkrantz Society*, 130 La. 802, 58 So. 578, 40 L. R. A. N. S. 75 (1912).

10. *Supra*, ¶ 47; *Fischer v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. 673 (1904), holding a city ordinance valid, which prohibited dairies within the city limits, without permission of the municipal assembly.

11. *Matter of Jacobs*, 98 N. Y. 98, 50 Am. R. 636 (1885), holding an act entitled "An Act to improve the public health, by prohibiting the manufacture of cigars and preparations of tobacco in any form in tenement houses, in certain cases, etc.," unconstitutional; *Shreveport v.*

11a. *State v. Biggs*, 133 N. C. 729, 735, 46 S. E. 401 (1903); "The legislature could no more enact that the 'practice of medicine and surgery' shall mean 'practice of medicine without surgery,' than it could provide that two and two make five, because it cannot change a physical fact."

12. *Board of Aldermen v. Norman*, 51 La. Ann. 736, 25 So. 401 (1899); *Pye v. Peterson*, 45 Tex. 312, 23 Am. R. 608 (1876); *State v. Mott*, 61 Md. 297, 48 Am. R. 105 (1883).

true test to be applied has been judicially stated¹³ as follows: "Nuisances may thus be classified: First, those which in their nature are nuisances *per se*, or are so denounced by the common law, or by statute; second, those which in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be conducted, managed, etc.; third, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. The power, granted by the statute to the governing bodies of municipal corporations, to declare what shall be nuisances, and to abate the same, etc., authorizes such bodies to conclusively denounce those things, falling within the first and third of these classes, to be nuisances; but, as to those things falling within the second class, the power possessed is only to declare such of them to be nuisances as are in fact so."

484. Nuisances Per Se. This class includes all wrongful disturbances of one's enjoyment of property or common rights, which have been constitutionally declared to be nuisances by statute or by judicial decision, or which are clearly actionable torts under established principles of the common law. "There are certain

13. *Laugel v. City of Bushnell*, 179 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266 (1902); *City of Carthage v. Munsell*, 203 Ill. 474, 67 N. E. 831 (1903); *Ex parte Lacey*, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. R. 93 (1895), ordinance held constitutional; *Belling v. Evansville*, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272 (1895); ordinance as to slaughter houses constitutional; *Comm. v. Parks*, 155 Mass. 531, 30 N. E. 174 (1892); ordinance as to blasting constitutional; *Ex parte O'Leary*, 65 Miss. 80, 3 So. 144, 7 Am. St. R. 640 (1887); ordinance as to hogs unconstitutional; *St. Louis v. Heitzeberg Packing Co.*, 141 Mo. 375, 42 S. W. 954, 64 Am. St. R. 516, 39 L. R. A. 551 (1897), smoke ordinance held unconstitutional; *In re Hong Wah*, 82 Fed. 623 (1897), ordinance prohibiting public laundries within city limits held unconstitutional. "To make an occupation indispensable to the health and comfort of civilized man, and the use of the property necessary to carry it on, a nuisance, by a mere arbitrary declaration in a city ordinance, and suppress it as such, is simply to confiscate the property and deprive the owner of it without due process of law. It also abridges the liberty of the owner to select his own occupation, and his own methods in the pursuit of happiness; and thereby prevents him from enjoying his rights, privileges and immunities and deprives him of the equal protection of the laws, secured to every person by the constitution of the United States."

things and certain trades which are considered as nuisances of themselves; as a slaughter-house in a thickly populated town, a pig-sty near a dwelling house,"¹⁴ a house of ill-fame,¹⁵ conduct amounting to public indecency,¹⁶ the fouling of springs, wells and streams,¹⁷ keeping a large quantity of explosives near dwellings,¹⁸ or keeping animals or other property dangerous to human life.¹⁹ In such cases the tort is established by proof of the existence of the thing, the prosecution of the trade, the maintenance of the establishment, or the acts and conduct in question.

485. Lawful and Laudable Business. When a business of this character is attacked as a nuisance, the plaintiff must show that it is conducted in an improper manner, or at an improper place. "The building of a limekiln is good and profitable," declared an English court, three hundred years ago, "but if it be built so near a house that, when it burns, the smoke enters into the house, so that none can dwell there, an action lies for it."²⁰ Even though the smoke and gases incident to such a commendable business do not drive the dwellers from the house, the business will still be adjudged a nuisance, if it renders the house uncomfortable, or if it materially injures trees, shrubs or vines growing upon the premises.²¹

14. *Att'y Gen. v. Steward*, 20 N. W. Va. 413, 21 S. E. 1035, 52 Am. St. J. Eq. 415, 417 (1869); *Evans v. Fertilizing Co.*, 160 Pa. 209, 213, 28 At. R. 890 (1895).

15. *Givens v. Van Studdiford*, 86 Mo. 149, 56 Am. R. 421 (1885); *Hamilton v. Whitridge*, 11 Md. 128 (1857); *Neaf v. Palmer*, 103 Ky. 496, 45 S. W. 506 (1898); *Cranford v. Tyrell*, 128 N. Y. 341, 28 N. E. 514 (1891).

16. *Hayden v. Tucker*, 37 Mo. 214 (1866); *Nolln v. Franklin*, 4 Yerg. (12 Tenn.) 163 (1833).

17. *State v. Taylor*, 29 Ind. 517 (1868); *Beach v. Sterling Iron Co.*, 54 N. J. Eq. 65, 33 At. 286 (1895).

18. *McAndrews v. Colterd*, 42 N. J. L. 189, 36 Am. R. 508 (1880); *Wilson v. Phoenix Powder Co.*, 40

19. *Muller v. McKesson*, 73 N. Y. 195, 29 Am. R. 123 (1875).

20. *Aldred's Case*, 9 Coke, 59a (1610).

21. *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. R. 567 (1876): "The fact that the trees and vines are for ornament, or for luxury, entitles them no less to the protection of the law. Every one has the right to surround himself with articles of luxury, and he will be no less protected than one who surrounds himself only with articles of necessity. The law will protect a flower or a vine as well as an oak. . . . The fact that the nuisance is not continued and that injury is only occasional, furnishes no answer to

The erection and maintenance of a hospital may be a work of the highest philanthropy, but if it operates to destroy the peace, quiet and comfort of those in adjoining residences, and seriously and injuriously affects their health and depreciates their property, the court will not hesitate to adjudge it a private nuisance to those who are in no way responsible for its location and operation.²²

486. Public cemeteries are most desirable but if "it can be clearly proved that a place of sepulture is so situated that the burial of the dead there will injure property or health, either by corrupting the surrounding atmosphere or the water of wells or springs," it will be adjudged a nuisance.²³ It will not be adjudged a nuisance, however, simply because it offends the fancy, delicacy or fastidiousness of neighbors, or even depreciates the market value of adjoining property.²⁴

487. Injury to Property. When the gist of the nuisance consists of injury to property, the plaintiff is required to show a "tangible and appreciable injury,"²⁵ an "injury which is certain and substantial and not slight or theoretical."²⁶ The damage must

the claim. The nuisance has occurred often enough, within two years, to do the plaintiffs large damage."

22. Deaconess Home and Hospital v. Bontjes, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215 (1904). To the objection of the defendant that the question of nuisance had not been submitted to a jury, the court replied, that if there was doubt upon the evidence, whether a nuisance existed or not, the question should be submitted to a jury, but as there was "no evidence tending to show that a nuisance does not exist," the court would grant an injunction without a finding by a jury.

23. Lowe v. Prospect Hill Cem. Ass'n, 58 Neb. 94, 78 N. W. 488, 46 L. R. A. 237 (1889). "A use made by one of his property which works an irreparable injury to the property of his neighbor; the use made

by one of his property whereby the unwritten, but accepted, law of decency is violated; the use made by one of his property whereby his neighbor is deprived of the reasonably comfortable use and enjoyment of his own property; the use made by one of his own property which will probably or likely endanger the health and the life of his neighbor—is a private nuisance."

24. Monk v. Packard, 71 Me. 309, 36 Am. R. 315, 43 A. L. J. 366 (1880).

25. Campbell v. Seaman, 63 N. Y. 568, 577, 20 Am. R. 567 (1876); Lane v. City of Concord, 70 N. H. 485, 49 At. 687 (1900).

26. Downing v. Elliott, 182 Mass. 28, 64 N. E. 201 (1902), "The fair import of the master's findings is, that, while he cannot say that no soot and cinders were deposited on the plaintiff's ice, if any were depos-

be such "as can be shown by a plain witness to a plain common jurymen. * * * If the plaintiff is obliged to start with scientific evidence, such as the microscope of the naturalist or the tests of the chemist, for the purpose of establishing the damage itself, that evidence will not suffice." ²⁷

488. When the plaintiff presents proof that the defendant's locomotive cast upon his land and salt vats such quantities of soot, cinders, dust and dirt as to injure the quality and quantity of his salt product, he is entitled to damages.²⁸ On the other hand, if he complains of a cemetery as a nuisance to his water supply, but fails to prove any contamination from that source, his action must fail.²⁹ So, if he complains of vibrations or shocks communicated to his property by machinery or blasting, on defendant's land, he must show not only sensible and certain harm to his property, but also unreasonable conduct on the defendant's part. "In the strict sense," remarked a learned judge, "the use of machinery producing noise or vibration injures neighboring property. But to some extent such results must come to all who live in a busy, prosperous city. The hum and throb of mechanical life cannot be wholly confined to the walls of any structure. Hence the true test must be whether the use by the owner of the industry is reasonable, having due regard to all the interests affected, and the requirements of public policy."³⁰ Again, it is not a private nuisance to resort to blasting on one's own land, when this is necessary to fit it for a lawful business. If such blasting is done without negligence, and the injury sustained by the plaintiff is consequential, he has no redress.³¹ Whether oil or

ited, they contributed only slightly, if at all, to the injury to the ice, and the damage done by them was insignificant as compared with that resulting from other causes."

27. *Salvin v. North Branceph Co.*, L. R. 9 Ch. 705, 709, 44 L. J. Ch. 149 (1874).

28. *Syracuse Solar-Salt Co. v. Rome, etc., Ry.*, 60 N. Y. Supp. 40, 43 App. Div. 203 (1899), affirmed 168 N. Y. 650 (1901).

29. *Wahl v. Meth. Ep. Cem.*, 197 Pa. 197, 46 At. 913 (1900).

30. Russell, J., in *Bowden v. Edison Elec. Co.*, 60 N. Y. Supp. 835 (1899).

31. *Booth v. R. W. & O. Ry.*, 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105 (1893): "The fundamental proposition, upon which the plaintiff's counsel rests his argument in support of the recovery, is that the use of the explosives constituted a

gas wells are a nuisance to adjoining property depends on their location, capacity and management. If such wells and their necessary accompaniments subject neighboring buildings to constant danger of destruction by fire, they are a nuisance, and if their owner wishes to gain the profit which they bring to him, he must pay to his neighbor the damages sustained by that neighbor for his pecuniary benefit, or stop his business.³²

489. Personal Discomfort. It is well settled that the acts of the defendant or a condition of things for which he is responsible, may amount to a nuisance, although actual sickness is not caused or threatened thereby. It is enough that they produce material physical discomfort and annoyance to persons of ordinary sensibility,³³ having regard to the locality in which the alleged nuisance exists. "Everything is to be looked at from a reasonable point of view."³⁴ Noises, odors, smoke or dust may constitute an ac-

nuisance, and that one who creates or maintains a nuisance is liable for any special injury resulting therefrom. . . . Whether a particular act done upon, or a particular use of one's premises constituted a violation of the obligations of vicinage would seem to depend upon the question whether such act or use was a reasonable exercise of the right of property, having regard to time, place and circumstances. It is not everything in the nature of a nuisance which is prohibited. . . . The rule governing the rights of adjacent landowners in the use of their property seeks an adjustment of conflicting interests through a reconciliation by compromise, each surrendering something of his absolute freedom, so that both may live. To exclude the defendant from blasting to adapt his lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between conflicting rights, but an extinguishment of the rights of the one for the benefit of the

other." See other cases and comments thereon, *supra*, ¶ 48.

32. *McGregor v. Camden*, 47 W. Va. 193, 34 S. E. 936 (1899).

33. *Bishop v. Banks*, 33 Conn. 118 (1865); bleating of calves kept overnight in a slaughter-house near plaintiff's dwelling; *Dittman v. Repp*, 50 Md. 517, 33 Am. R. 325 (1878), noise resulting from a lawful business; *Catlin v. Valentine*, 9 Paige (N. Y.) 575 (1842), slaughter-house in a city; *Ross v. Butler*, 19 N. J. Eq. 294 (1868), smoke, cinders, noise or odors, although not in a degree injurious to health, may amount to a nuisance; *Rhodes v. Dunbar*, 57 Pa. 274 (1868), noises disturbing sleep; *Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. 241 (1886), roller-skating rink; *Crump v. Lambert*, L. R. 3 Eq. 409 (1867), "the real question is whether the annoyance is such as materially to interfere with the ordinary comfort of human existence."

34. *St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 642, 35 L. J. Q.

tionable nuisance in one locality, when the same amount of either or all of them in another locality would not create a nuisance. "The reasonable use of one's property depends on the circumstances of each case. What would be permissible in one locality might be unlawful in another."³⁵

Moreover, the source of noises, when these are complained of as a nuisance, is to be taken into account. If they proceed from ordinary musical instruments in the dwelling of a neighbor, or from his children, and are only such as are to be expected in the particular neighborhood, they must be put up with, unless valid legislation has prohibited them.^{35a} While the same amount of noise caused by horses in the basement of an adjoining house will be an actionable nuisance.³⁶

490. Discomfort to Ordinary Persons. The test to be applied, in such cases as we are now considering, is whether the conduct of the defendant, or the state of things for which he is responsible subjects ordinary persons in the neighborhood to material and unreasonable discomfort. It may be very unkind, or even inhuman, for one to continue a noise or a business on his premises, which shocks the nerves or sensibilities of his sick or fastidious neighbors. But, legal rights to the use of property are not to be determined by such a fluctuating standard, as the personal peculiarities, or state of health of one's neighbor. The standard to be

B. 66 (1865); *Gaunt v. Fynney*, L. R. 8 Ch. App. 8, 42 L. J. Ch. 122 (1872).

³⁵. *Lord v. DeWitt*, 116 Fed. 713 (1902); *Hurlbut v. McKone*, 55 Conn. 31, 10 At. 164, 3 Am. St. R. 17, 36 A. L. J. 168 (1887); *Norcross v. Thoms*, 51 Me. 503 (1863); *Rodenhausen v. Craven*, 141 Pa. 546, 21 At. 774 (1891), "What is a nuisance is very largely a question of fact, in determining which all the circumstances must be taken into consideration, with the right of the plaintiff and defendant to the use of their property." The court held that the evidence fully justified the

finding, that defendant's stable and carpet cleaning establishment were a nuisance, in a residential neighborhood; *Robert v. Powell*, 168 N. Y. 411, 61 N. E. 699 (1911), holding that a stepping stone on sidewalk in front of defendant's house was not a nuisance.

^{35a}. *Innes v. Newman*, (1894) 2 Q. B. 292, 63 L. J. Q. B. 671, by-law prohibiting noises in the street to the annoyance of inhabitants, warranted the arrest of a boy crying newspapers.

³⁶. *Ball v. Ray*, L. R. 8 Ch. Ap. 467 (1873).

applied is the effect of such use upon the comfort of ordinary people in the vicinity.³⁷ Applying this standard, the fact that the defendant intends to reside in the upper story of an undertaker's establishment does not show that the establishment is not a nuisance.^{37a}

491. Temporary Annoyance. The courts are agreed that there is a manifest distinction between acts and uses which are permanent and continuous, and temporary acts, which are resorted to in the course of adapting premises to some lawful use. "For example, the erection of an iron building adjacent to a dwelling might, for the time being, cause as much noise and discomfort as would arise from conducting the business of finishing steam boilers on adjacent premises; but this would not constitute a nuisance, and the owner of the dwelling would have no remedy."³⁸

37. Rogers v. Elliott, 146 Mass. 349, 15 N. E. 768, 4 Am. St. R. 316 (1888), "Plaintiff's claim rests upon the injury done him on account of his peculiar condition. However this request should have been treated by the defendant, upon considerations of humanity, we think he could not demand as of legal right that the bell should not be used." **Wescott v. Middleton**, 43 N. J. Eq. 478, 37 A. L. J. 93 (1887), defendant's business as undertaker affected the tender sensibilities of the plaintiff; but the court found that it would not affect ordinary persons uncomfortably, and hence was not an actionable nuisance; **Lord v. DeWitt**, 116 Fed. 713 (1902), "The plaintiff's contention is that he is suffering from a disease and an operation which have left him in such an exceedingly enfeebled condition, that his heart has become very weak, and himself extremely sensitive to any shake or jar; that, in the opinion of his physicians, a jar such as might be occasioned by

the slightest possible blast on the defendant's lot might cause his death; wherefore he contends that the defendant should be enjoined from using his property in the usual way, by excavating for a building, until plaintiff dies or recovers sufficiently to move away. This is a startling proposition and one which finds no support in the authorities. . . . Plaintiff has mistaken his forum. The only real basis for his contention is common humanity, and to defendant's humanity, not to legal tribunals, his appeal must be made."

37a. Densmore v. Evergreen Camp, 61 Wash. 230, 112 Pac. 255, 31 L. R. A., N. S. 608 (1910).

38. Booth v. R. W. & O. Ry., 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105. (1893). In this case, blasting was held not to be a nuisance, although had it been continuous and permanent, it would have amounted to a nuisance; **Harrison v. Southwork, etc., Co.**, (1891) 2 Ch. 409, 60 L. J. Ch. 630.

Even in the case of temporary annoyance, incident to the reasonable improvement or use of premises, the annoyer must act reasonably. He cannot blast rock, or hammer metal, or operate noisy steam drills or hoisting machines, at all hours of the day and night. He must conform to the habits of the community, and not unreasonably disturb his neighbors, during ordinary non-working hours.³⁹ Moreover, it is important to distinguish between acts, which merely annoy, and those which injure, or are calculated to injure seriously, adjoining property. As a rule, the latter will amount to an actionable nuisance, although their continuation for an indefinite period may not be intended by the defendant. The principal applicable to a temporary disturbance has been stated by an eminent judge as follows: "Those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. * * * There is an obvious necessity for such a principle. It is as much for the advantage of one owner as another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbor's land, he will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live."⁴⁰

492. Negligence Not Necessary. If the plaintiff proves that he has been harmed by a nuisance, for which the defendant is responsible, it is unnecessary for him to show that the defendant was

³⁹ *Peacock v. Spitzelberger*, The majority of the court held that (Ky.) 29 S. W. 877 (1895), work in this rule did not include the burn-blacksmith shop prohibited between ing of bricks on defendant's land, 8 p. m. and 6 a. m.; *McDonald v. Newark*, 42 N. J. Eq. 136 (1886); although the business was to be limited to bricks for use on the land. *Stevenson v. Pucce*, 66 N. Y. Supp. 712 (1900), defendant was restrained Approved in *Colwell v. St. Pancras Borough Council* (1904), 1 Ch. 707, 73 L. J. Ch. 275, where the defendant claimed that the vibration, m; *Dannis v. Eckhart*, 3 Grant's Cases (Pa.) 390 (1862). caused by an electric generating station, could be avoided after a

⁴⁰ *Bramwell, B., in Bamford v. Turnley*, 3 B. & S. 62, 83 (1862). time by experiment and alteration of machinery.

negligent in the matter. "As a general rule, the question of care, or want of care, is not involved in an action for injuries resulting from a nuisance."⁴¹ If a person stores on his land explosives, in such quantities and in such proximity to his neighbors, as to amount to a nuisance, it will be no answer for him when sued for damages caused by their explosion, that he exercised the greatest possible care in guarding them. Though their explosion may be due to a fire for which he is in no way responsible, or to lightning, or to the criminal act of a third person, he is legally answerable for the harm.⁴²

493. If, however, the storing of explosives at the particular place does not amount to a nuisance, the defendant is not liable for damages caused by their explosion, in the absence of evidence that he was negligent in collecting or guarding them.⁴³

494. When a business is carried on,⁴⁴ or structures are erected or excavations are made, for which defendant is responsible, and which are private nuisances to the plaintiff, the defendant is liable for damages caused by them, whether he exercised due care in

41. *Lafin & Rand Powder Co. v. L. R. A.* 716 (1902); *Wilson v. Phoenix Powder Co.*, 131 Ill. 322, 23 N. E. 390, 7 L. R. A. 262, 19 Am. St. R. 34 (1890).

42. *Rudder v. Koopman*, 116 Al. 332, 22 So. 601, 37 L. R. A. 489 (1896); *Kleebauer v. Western Fuse Co. (Cal.)*, 69 Pac. 246, 60 L. R. A. 377 (1902); *Cameron v. Kenyon-Cornell Co.*, 22 Mont. 312, 56 Pac. 358, 74 Am. St. R. 602, 44 L. R. A. 508 (1899); *McAndrews v. Collard*, 42 N. J. 189, 36 Am. R. 508 (1880); *Heeg v. Licht*, 80 N. Y. 579, 36 Am. R. 654 (1880); *Prussak v. Hutton*, 30 App. Div. 66, 51 N. Y. Supp. 761 (1898); *Bradford Glycerine Co. v. St. Mary's Woolen Co.*, 60 O. St. 560, 54 N. E. 528, 45 L. R. A. 658, 71 Am. St. R. 740 (1899); *Cheatham v. Powder Co.*, 1 Swan (31 Tenn.) 213, 55 Am. Dec. 734 (1851); *Fort Worth Ry. v. Beauchamp*, 95 Tex. 496, 500, 68 S. W. 502, 93 Am. St. R. 864, 58 L. R. A. 716 (1902).

43. *Kinney v. Koopman*, 116 Al. 310, 22 So. 593, 67 Am. St. R. 119, with note, 37 L. R. A. 497 (1896); *Kleebauer v. Western Fuse Co.*, 138 Cal. 497, 71 Pac. 617, 94 Am. St. R. 62, 60 L. R. A. 377 (1903); *Tuckashinsky v. Lehigh, etc., Co.*, 199 Pa. 515, 49 At. 308 (1901); *Fort Worth Ry. v. Beauchamp*, 95 Tex. 496, 68 S. W. 502, 93 Am. St. R. 864, 58 L. R. A. 716 (1902).

44. *Bohan v. Port Jervis Gas Co.*, 122 N. Y. 18, 25 N. E. 246 (1890).

their construction and maintenance or not.⁴⁵ The same rule applies in the case of a savage and dangerous animal, so kept as to be a nuisance.⁴⁶

As negligence is not the gist of the action in such cases, contributory negligence on the plaintiff's part is no defense.⁴⁷

At times, it is not easy to determine whether the defendant's conduct amounts to the maintenance of a nuisance, or to negligence only.^{47a}

495. Coming to a Nuisance. Blackstone declared⁴⁸ that if one fixes his habitation near a nuisance, he has no remedy for the damage which the nuisance causes him, on the ground of "*volenti non fit injuria*." This view has long been discarded, both in England⁴⁹ and in this country.⁵⁰ If one property owner by devoting

45. *Hazeltine v. Edgmond*, 35 Kan. 202, 10 Pac. 544, 57 Am. R. 157 (1886); *Cork v. Blossom*, 162 Mass. 330, 38 N. E. 495, 44 Am. St. R. 362, 26 L. R. A. 256 (1894). In this case, it was held that the structure was not a nuisance, unless unfit to withstand ordinary gales. If so unfit, it was maintained by the defendant at his peril. *Davis v. Rich*, 180 Mass. 235, 62 N. E. 375 (1902); *Cahill v. Eastman*, 18 Minn. 324, 10 Am. R. 184 (1874); *Davis v. Niag. Falls Power Co.*, 25 App. Div. 321 (1898), 171 N. Y. 336, 64 N. E. 4, 89 Am. St. R. 817, 57 L. R. A. 545 (1902).

46. *Smith v. Pelah*, 2 Strange, 1264 (1748); *Card v. Case*, 5 C. B. (57 Eng. C. L.) 622 (1848); *Woolf v. Chalker*, 31 Conn. 121, 130, 81 Am. Dec. 175 (1860); *Muller v. McKesson*, 73 N. Y. 195, 29 Am. R. 123 (1878); *Twigg v. Ryland*, 67 Md. 380, 50 Am. R. 226 (1884); *McCaskell v. Elliott*, 5 Strob. (S. C.) 196, 53 Am. Dec. 706 (1850). In *Hayes v. Smith*, 62 O. St. 161, 56 N. E. 879 (1900), the court holds that negligence in keeping even a vicious animal must be shown.

47. Authorities cited in preceding note.

47a. *Hayes v. Brooklyn Heights Ry.*, 200 N. Y. 183, 93 N. E. 469 (1910), allowing a rut to form in the highway is negligence; but an insufficient cover for a coal hole in the sidewalk, *Clifford v. Dam*, 81 N. Y. 52 (1880), or a water pipe from the roof to the sidewalk causing ice on the latter, *Tremblay v. Harmony Mills*, 171 N. Y. 598, 64 N. E. 501 (1902) is a nuisance; *Hogle v. H. Franklin Mfg. Co.*, 199 N. Y. 388, 92 N. E. 794, 32 L. R. A. N. S. 1038 (1910).

48. Commentaries, Vol. 2, p. 403.

49. *St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 642, 35 L. J. Q. B. 66 (1865); *Bamford v. Turnley*, 3 B. & S. 62, 66 (1862).

50. *Hurlbut v. McKone*, 55 Conn. 31, 10 A. R. 164, 3 Am. St. R. 17, 36 A. L. J. 168 (1887); *Laffin & Randall Powder Co. v. Tearney*, 131 Ill. 322, 23 N. E. 390, 19 Am. St. R. 34 (1890); *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 At. 900, 25 Am. St. R. 595 (1890); *Bushnell v. Robinson*, 62 Ia. 540, 18 N. W.

his premises to a particular trade, at a time when the surrounding property is vacant, can acquire a right to continue the business, however offensive it may be to dwellers coming into the neighborhood, then he has it in his power to virtually control the uses to which such property may be put, or to destroy its value.

Nor is it any answer for the defendant, whose use of his premises amounts to a nuisance, that the place is a convenient one for him and for the public. "In the eye of the law, no place can be convenient for the carrying on of a business which is a nuisance, and which causes substantial injury to the property of another. Nor can any use of one's land be said to be a reasonable use, which deprives an adjoining owner of the lawful use and enjoyment of his property."⁵¹

496. Undoubtedly, when a court of equity is asked to enjoin a useful and lawful business as a nuisance in a particular locality, regard will always be had to the inquiry whether the business has been carried on for a considerable period, and the erection of buildings and growth of population have been due to its existence.⁵² If the development of the locality is due largely to the offensive business, and the thing complained of is not positively noxious but only disagreeable, an injunction may be denied.⁵³ If, however, the business is actually harmful to health or destructive of property, it will be enjoined, although the cessation or removal may entail a heavy burden upon the defendant.⁵⁴

888 (1883); *King v. Morris, etc.*, (1890). James, L. J., said in *Salvin Ry.*, 18 N. J. Eq. 397 (1867); *Campbell v. Seaman*, 63 N. Y. 584, 20 Am. R. 567 (1876); *Sherman v. Langham* (Tex.), 13 S. W. 1042 (1890). *v. Brancepeth Coal Co.*, L. R. 9 Ch. 705, 44 L. J. Ch. 149 (1874), "If some picturesque haven opens its arms to invite the commerce of the

51. *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 277 (1890). A contrary doctrine seems to be applied in *Dolan v. Chicago, etc., Ry.*, 118 Wis. 362, 95 N. Y. 385 (1903). But see *Anderson v. Chicago, etc., Ry.*, 85 Minn. 337, 88 N. W. 1001 (1902). world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and shipbuilding town, which would drive the Dryads and their masters from their ancient solitudes." See *Dolan v. Chicago, etc., Ry.*, 118 Wis. 362, 95 N. W. 385 (1903).

52. *Wier's Appeal*, 74 Pa. 230, 241 (1873).

53. *Ballentine v. Webb*, 84 Mich. 38, 47 N. W. 485, 13 L. R. A. 321 54. *Bohan v. Port Jervis Gas. Co.*, 122 N. Y. 18, 25 N. E. 246 (1890);

§ 2. PUBLIC NUISANCE.

497. Private Action For. The earliest and most frequent cases of public nuisances, which also subject the wrongdoer to a private action, involve obstructions to highways. Such an obstruction "is a common nuisance, and, being a wrong of a public nature, the remedy is by indictment. It is not in itself a ground of civil action by an individual, unless he has suffered from it some special and particular damage which is not experienced in common with other citizens. In such a case, the actual damage to the plaintiff constitutes the gist of the action."⁵⁵

The difficulty in this class of cases has been to determine whether the plaintiff has sustained damage in his individual capacity, or only as one of the public.⁵⁶ If the nuisance interferes with the rights of travel common to him and the public, his inconvenience and consequential injury are not deemed special damage.⁵⁷ If, however, it compels him to unload goods and carry them around the obstruction in a more expensive way,⁵⁸ or if it compels him to travel back and take a more circuitous route, with an obvious loss of time and profit, or to forego his business altogether;⁵⁹ or if it

Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 At. 1065 (1904). The dissenting opinions in this case are worthy of careful perusal. **Judson v. Los Angeles Sub. Gas Co.**, 157 Cal. 168, 106 Pac. 581, 26 L. R. A. N. S. 183 (1910).

55. Houck v. Wachter, 34 Md. 265, 6 Am. R. 332 (1870).

56. Knowles v. Penn. Ry., 175 Pa. 623, 629-630, 34 At. 974, 52 Am. St. R. 860 (1896); **Brayton v. Fall River**, 113 Mass. 218, 18 Am. R. 470 (1873).

57. Flineux v. Hovenden, Cro. Eliz. 664 (1600); **Winterbottom v. Lord Derby**, L. R. 2 Ex. 316, 36 L. J. Ex. 194 (1867); **Dennis v. Mobile, etc., Ry.**, 137 Al. 649, 35 So. 30, 97 Am. St. R. 69 (1902); **Griffith v. Holman**, 23 Wash. 347, 63 Pac. 239, 83 Am. St. R. 831, 54 L. R. A. 178 (1900).

58. Rose v. Miles, 4 M. & S. 101.

59. Greasley v. Codling, 2 Bing. 263 (1824); **Piscataqua Nav. Co. v. N. Y., etc., Ry.**, 89 Fed. 362 (1898); **Dudley v. Kennedy**, 63 Me. 465 (1874); **Farmers' Co-op. Co. v. Albemarle, etc., Ry.**, 117 N. C. 579, 23 S. E. 43 (1895); **Hughes v. Heiser**, 1 Binn. (Pa.) 463, 2 Am. Dec. 459 (1808); **Knowles v. Penn. Ry.**, 175 Pa. 623, 34 At. 974, 52 Am. St. R. 860 (1896), plaintiff had a contract to haul dirt at 15c. a load; with highway as obstructed by defendant, the cost of hauling would be 40c. a load; nuisance was held a special injury to plaintiff; **Gloss-Sheffield Steel & I. Co. v. Johnson**, 147 Ala. 384, 41 So. 907, 8 L. R. A. N. S. 226 (1906); **Sholin v. Skamania Boom Co.**, 56 Wash. 303, 105 Pac. 632, 28 L. R. A. N. S. 1053 (1909).

60. Iveson v. Moor, 1 Ld. Ray 486, 1 Salk. 15, Carth. 451, Comber. 480,

blocks up the only or principal means of ingres and egress to plaintiff's land or place of business;⁶⁰ or if it unreasonably diverts custom from the plaintiff's place of business;⁶¹ or if it invades the plaintiff's easement of light and air in the highway,⁶² a private action will lie.

498. The rule that the law does not permit private actions to be brought for the abatement of public nuisances, or for damages caused thereby, unless special damage to the plaintiff is also shown, distinct not only in degree but in kind from that which is done to the whole public, "has never been extended to cases where the alleged wrong is done to private property, or the health of individuals is injured, or their peace and comfort in their dwellings is impaired, by the carrying on of the offensive trades and occupations."⁶³ Moreover, it is the tendency of courts in this country to sustain a private action whenever the plaintiff can show that he has sustained a clear injury as an individual, however slight that may be.⁶⁴

§ 3. PARTIES TO NUISANCE ACTIONS.

499. **Who May Bring the Action.** Originally, as we have seen, only the owner of a freehold interest in lands could maintain an

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| <p>Holt. 10; S. C. as <i>Jeveson v. Moor</i>, 12 Mod. 262 (1698); <i>Roberts v. Mathews</i>, 137 Al. 523, 34 So. 624, 97 Am. St. R. 56 (1902); <i>Venard v. Cross</i>, 8 Kan. 248 (1871); <i>Brayton v. Fall River</i>, 113 Mass. 218 (1873); <i>Smith v. Mitchell</i>, 21 Wash. 536, 58 Pac. 667, 75 Am. St. R. 858 (1899).</p> <p>61. <i>Wilkes v. Hungerford Mark. Co.</i>, 2 Bing. N. C. 281, 1 Hodges 281, 2 Scott 446 (1835); <i>Fritz v. Hobson</i>, 14 Ch. D. 42, 49 L. J. Ch. 321 (1880); <i>Flynn v. Taylor</i>, 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556 (1891).</p> <p>62. <i>First Nat. Bank v. Tyson</i>, 133 Al. 459, 32 So. 144, 91 Am. St. R. 46, 59 L. R. A. 399 (1902); <i>Townsend v. Epstein</i>, 93 Md. 537, 49 At. 629, 86 Am. St. R. 441, 52 L. R. A. '09 (1901).</p> | <p>63. <i>Wesson v. Washburn Iron Co.</i>, 13 Allen (95 Mass.) 95, 90 Am. Dec. 181 (1866); <i>Roberts v. Mathews</i>, 137 Al. 523, 34 So. 624, 97 Am. St. R. 56 (1902); <i>Adams Hotel Co. v. Cobb</i>, (Ind. Terr.) 53 S. W. 478 (1899); <i>Reinhart v. Sutton</i>, 58 Kan. 726, 51 Pac. 221 (1897); <i>Downs v. City of High Point</i>, 115 N. C. 182, 20 S. E. 385 (1894), accord.</p> <p>64. <i>Callahan v. Gilman</i>, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. R. 831 (1887); <i>Pierce v. Dart</i>, 7 Cowen (N. Y.) 609 (1827), holding that the delay and expense of plaintiff, in abating the nuisance, was sufficient special damage to sustain the action. Contra, <i>Winterbottom v. Lord Derby</i>, L. R. 2 Ex. 316, 36 L. J. Ex. 194 (1867).</p> |
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action for a nuisance. This doctrine was long ago modified, and now a tenant in possession of premises, injuriously affected by a nuisance, is entitled to sue therefor, even though he became tenant after the nuisance was instituted. The measure of his damages will be, ordinarily, the depreciation in the rental value of the premises caused by the nuisance.⁶⁵

If the nuisance operates to permanently injure the leased premises, or create an easement over them, the reversioner has a right of action also. Indeed, for any injury to his rights as reversioner the owner may sue, although the same nuisance may be actionable in favor of a tenant as well.⁶⁶

500. Nuisance to Health. When the nuisance does not operate to injure property, but affects the health or personal comfort of individuals, who have no estate or legal interest in adjoining premises, the courts are not agreed as to whether such individuals can maintain an action for nuisance. On the one hand it is held, that a private action on the case for nuisance consisting in offensive and noxious odors, smoke or noises, can be brought only by one who is the owner of, or has some legal interest, as lessee or otherwise, in land, the enjoyment of which is affected by the nuisance.⁶⁷

On the other hand it is held, that any one who has sustained special damage, such as sickness, by reason of a nuisance, whether public or private, is entitled to sue for such damage, in an action on the case for nuisance, although he has no property rights in the premises, where he lawfully is when the injury is inflicted.⁶⁸

⁶⁵ *Bly v. Edison Electric Light Co.*, 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500 (1902); *Smith v. Phillips*, 8 Phil. (Pa.) 10 (1871). See *Broder v. Saillard*, 2 Ch. D. 692, 45 L. J. Ch. 414 (1876).

⁶⁶ *Jones v. Chappell*, L. R. 20 Eq. 539, 44 L. J. Ch. 658 (1875); *Baker v. Sanderson*, 3 Pick. (20 Mass.) 348 (1825); *Francis v. Schoelkopf*, 53 N. Y. 152 (1873); *Hine v. N. Y. Elec. Ry.*, 128 N. Y. 571, 29 N. E. 69 (1891).

⁶⁷ *Kavanagh v. Barber*, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689 (1892); *Ellis v. Kansas City Ry.*, 63 Mo. 131, 21 Am. Rep. 436 (1876).

⁶⁸ *Fort Worth, etc., Ry. v. Glenn*, 97 Tex. 586 80 S. W. 992, 65 L. R. A. 818, 104 Am. St. R. 894, 1 Ann. Cas. 274 (1904). "It seems to us that the conflict of opinion has arisen from confusing the damage, which results to property from a nuisance, with that special damage which may result to the individual from the nuisance." Cf. *Shipley v. Fifty Associations*, 106 Mass. 194, 8 Am. R. 318 (1870), an action for damages caused by the falling of snow from defendant's building upon plaintiff while walking along the street. The court said: "For the purpose

There can be no doubt that the plaintiff would be entitled to recover, upon proof of negligence on the part of the defendant, in the performance of any duty owing by him to the plaintiff.⁶⁹

501. Municipal Corporation as Plaintiff. As a property owner, a municipal corporation may maintain an action for a nuisance, precisely as though it were a private corporation or a natural person.⁷⁰ When it is clothed with authority to keep highways in proper condition and to abate nuisances, it may be the plaintiff in an action for nuisance, without regard to special damage having been caused to its corporate interests, or to those of any of its citizens.⁷¹

502. Who May Be Sued for a Nuisance. Certainly the person who creates and maintains a nuisance is liable to a suit therefor.⁷² It does not matter that his acts or omissions give rise to a nuisance on the land of a third person, whither he has no legal right to go, in order to abate it. He must still answer for its consequences.⁷³ Nor does it matter that the defendant is a corporation, or a master, and that the nuisance is due to the acts or omissions of officers, agents or servants; although these various representatives may be liable also.⁷⁴

for which plaintiff was walking along the street, her rights were exactly the same as though she owned the soil in fee simple. . . . In contemplation of law, the person is at least as much entitled to protection as the state." *Hosmer v. Repub. Iron & S. Co.*, — Ala. —, 60 So. 801 (1913).

69. *Hunt v. Lowell Gas Light Co.*, 8 Allen (90 Mass.) 169, 85 Am. Dec. 697 (1864).

70. *U. S. v. Cole*, 18 D. C. 504 (1889); *Dayton v. Roberts*, 1 Ohio Dec. 385 (1894).

71. *Burlington v. Schwartzman*, 52 Conn. 181, 52 Am. R. 571 (1884); *Nor. Cen. Ry. v. Baltimore*, 21 Md. 93 (1863); *Town of Hutchinson v. Filk*, 44 Minn. 536, 47 N. W. 255 (1890); *City of Llano v. Llano County*, 5 Tex. Civ. App. 132, 23 S.

W. 1008 (1893), and authorities suggested; *Waukesha Hygela Min. Spring Co. v. Waukesha*, 83 Wis. 475, 53 N. W. 675 (1892).

72. *Dorman v. Ames*, 12 Minn. 451 (1867); *McDonald v. Newark*, 42 N. J. Eq. 136 (1886); *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, 38 At. 631 (1897).

73. *Thompson v. Gibson*, 7 M. & W. 456, 9 Dowl. P. C. 717 (1841); *Miles v. Worcester*, 154 Mass. 511, 28 N. E. 676, 26 Am. St. R. 264 (1891); *Smith v. Elliott*, 9 Pa. 345 (1848); *Adler v. Pruitt*, 169 Al. 213, 53 So. 315, 32 L. R. A. N. S. 889 (1910).

74. *Supra*, Chap. IV., § 3. Also *Miles v. Worcester*, 154 Mass. 511, *supra*; *Jersey City v. Kiernan*, 50 N. J. L. 246, 13 At. 170 (1888); *Winn v. Rutland*, 52 Vt. 481 (1880).

The creator of a nuisance cannot escape liability for its consequences, in most jurisdictions, by leasing or selling it to another.⁷⁵ In an early American case on this subject it is said, "If the question, which this case presents, were now to be decided for the first time, it seems to us that it would be very difficult to find a good reason why the original wrongdoer should be discharged by conveying the land. The injury has no connection with the ownership of the land. * * * We are not aware that in any action against an individual for a tort, it can be a good defense to show that a third person has assented to the wrong and thus become liable."⁷⁶

The view has been expressed by some courts, however, that even the creator of a nuisance will not be answerable for its continuance, after he has parted with the possession of the land; unless he derives a benefit from the nuisance, as by devising the premises and receiving rent, or unless in the conveyance of the property, he covenants for its continuance.⁷⁷

503. Liability of Grantee. Although the author of a nuisance may not rid himself of liability by parting with the ownership of property with which it is connected, the tenant or grantee of such property may subject himself to liability therefor.⁷⁸ Ordinarily, however, he does not become liable by simple failure to remove the nuisance, nor even by the enjoyment of "adventitious, accidental advantages from it."⁷⁹ Nor will his repair of a structure which constitutes a nuisance, as distinguished from rebuilding it render him liable.⁸⁰ There must be some active participa-

75. *Roswell v. Prior*, 2 Salk. 459, with approval in *East Jersey Water* 1 Lord Raym. 713, 12 Mod. 635 Co. v. Bigelow, 60 N. J. L. 201, 38 (1699); *Dorman v. Ames*, 12 Minn. At. 631 (1897); *Upp v. Darnier*, 150 451 (1867); *Hyde Park, etc., Co. v. Ia.* 403, 130 N. W. 409, 32 L. R. A. N. Porter, 167 Ill. 276, 47 N. E. 206 S. 743 (1911). (1897).

76. *Plumer v. Harper*, 3 N. H. 88, 92, 14 Am. Dec. 333 (1824).

77. *Hanse v. Cowing*, 1 Lans. (N. Y.) 288 (1869), citing *Mayor of Albany v. Cunliff*, 2 N. Y. 165 (1849); *Waggoner v. Jermaine*, 3 Den. (N. Y.) 306 (1846), and *Blunt v. Aiken*, 15 Wend. (N. Y.) 522, 30 Am. Dec. 72 (1836). These cases are cited

78. *Cobb v. Smith*, 38 Wis. 21 (1875).

79. *Hughes v. Mung*, 3 H. & Mc. 441 (1796). A stream had been diverted by defendant's grantee, and defendant had permitted his cattle to drink from it.

80. *McDonough v. Gilman*, 3 Allen (85 Mass.) 264 (1861).

tion in the continuance of the nuisance, or some positive act done evidencing its adoption by the grantee.⁸¹ Such acts were shown in a leading English case.⁸² Defendant's husband diverted water from plaintiff's conduit by means of "a little pipe and a cock, drawing thereby water to serve his house, and to stop it again at his pleasure." After his death, the defendant while occupying the house continued to use the water, and the court held that she was guilty of a new diversion, "because the portion of the water turned aside had not continual course or running, but was sometimes stopped by the cock, and opened again at defendant's pleasure."

When the grantee has not become an active participant in the maintenance of the nuisance, it is well settled both in England and in this country, that he cannot be held liable until he has notice of its existence.⁸³ If the nuisance is not such *per se*, there is much authority for the view that the grantee will not be liable until he has been requested to abate it. "This rule," it is declared, "is a very reasonable one. The purchaser of property might be subjected to great injustice, if he were responsible for consequences of which he was ignorant and for damages which he never intended to occasion."⁸⁴

81. *Walter v. County Comm'rs*, 35 Ky. 254 (1864); *Pillsbury v. Moore*, Md. 385, 392 (1871); *Curtice v. Thompson*, 19 N. H. 471 (1849). 44 Me. 154, 69 Am. Dec. 91 (1857); *Nichols v. Boston*, 98 Mass. 39, 93

82. *Moore v. Brown*, Dyer 319b (1573); *Leahan v. Cochran*, 178 Mass. 566, 569, 60 N. E. 382, 53 L. R. A. 891, 86 Am. St. R. 506 and note (1901). Defendant maintained a conductor pipe from roof to sidewalk, which was a public nuisance, of whose continuance defendant must be presumed to have known; *Morris Canal Co. v. Ryerson*, 27 N. J. L. 457 (1859); *Meyer v. Harris*, 61 N. J. L. 83, 101, 38 At. 630 (1897), accord. In the last case the defendant held a lease of the land for 999 years, and the court said he should be considered for all practical purposes the owner. 48 Am. Dec. 132 (1867); *Thornton v. Smith*, 11 Minn. 15 (1865); *Pinney v. Berry*, 61 Mo. 359 (1875); *Conhocton Stone Road v. Buff., etc., Ry.*, 51 N. Y. 573, 10 Am. R. 646 (1873); *Dodge v. Stacey*, 39 Vt. 558, 577 (1867); *Bishop v. Readsboro C. M. Co.*, 85 Vt. 141, 81 At. 454, 36 L. R. A. N. S. 1171 (1911); *Slight v. Gutzlaff*, 35 Wis. 675, 17 Am. R. 478 (1874); *Phil & C. Ry. v. Smith*, 64 Fed. 679 (1894).

84. *Johnson v. Lewis*, 13 Conn. 303, 397, 33 Am. Dec. 405 (1839); *West v. Louisville, etc., Ry.*, 8 Bush (71 Ky.) 404 (1871); *Pierson v. Glean*, 14 N. J. L. 36 (1833); *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333, with note (1824).

83. *Penruddock's Case*, 5 Coke 100b; *Ray v. Sellers*, 1 Duv. (62

504. Landlord and Tenant. In accordance with the principles stated in the foregoing paragraph, the owner of property having a nuisance thereon, is liable for the damages which it occasions, even after he has leased it to a tenant.⁸⁵ So he is, if he covenants to repair; and the nuisance arises during the tenancy, because of his omission to repair; or if he leases the premises to be used as a nuisance.⁸⁶ As a general rule, if there is no nuisance when the property is leased, and the tenancy is not for purpose of maintaining one, and the landlord does not covenant to repair, the liability for a nuisance rests solely on the occupant and author of the nuisance.⁸⁷

505. Landowner and Licensee. While a landowner is not liable for a nuisance created and maintained on his land by a stranger, whose acts or omissions are in no way attributable to him,⁸⁸ he is liable for a nuisance resulting from a licensee's use of his property.⁸⁹ Indeed, it has been held that if one, without the landowner's consent, attaches a wire to a chimney and thus converts it into a nuisance to passers-by, the landowner will be liable for consequent damages, if knowingly he permits the nuisance to continue.⁹⁰

506. Joint Liability. The grantor and grantee, or the landlord and tenant, or licensor and licensee, or the master and servant may be sued jointly for the nuisance, in cases where the

⁸⁵. *Patterson v. Jos. Schlitz Brewing Co.*, 16 S. D. 33, 91 S. W. 336 (1902); *Schwalbach v. Shinkle, etc.*, Co., 97 Fed. 483 (1899) and cases cited. In *Riley v. Simpson*, 83 Cal. 217, 23 Pac. 293 (1890), the landlord furnished material used by the tenant in erecting the nuisance, and was held liable.

⁸⁶. *Ahern v. Steele*, 115 N. Y. 203, 209, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. R. 778 (1889), and cases

cited in prevailing and dissenting opinions; *Timlin v. Stand. Oil Co.*, 126 N. Y. 514, 27 N. E. 786, 22 Am. St. R. 845 (1891), the same liability rests upon a subletting tenant.

⁸⁷. *Pretty v. Bickmore*, L. R. 8 C. P. 401, 28 L. T. N. S. 704 (1873); *Lufkin v. Zane*, 157 Mass. 117, 31 N. E. 757, 34 Am. St. R. 262, 17 L. R. A. 251 (1892); *Harris v. Cohen*, 50 Mich. 324 (1883); *Wunder v. McLean*, 134 Pa. 334, 19 At. 749, 19 Am. St. R. 702 (1890).

⁸⁸. *Wolf v. Kilpatrick*, 101 N. Y. 146, 4 N. E. 188, 54 Am. R. 672 (1886).

⁸⁹. *Rockport v. Rockport Granite Co.*, 177 Mass. 246, 58 N. E. 1017, 51 L. R. A. 779.

⁹⁰. *Gray v. Boston Gas L. Co.*, 114 Mass. 149, 19 Am. R. 324 (1873).

plaintiff has his option of suing either. So other persons, whatever their legal relations, who co-operate in causing or in continuing a nuisance, may be sued jointly therefor.⁹¹

Where, however, the acts of the various parties are entirely independent and without the element of concert, although of a similar character and producing like harm to the plaintiff, the wrongdoers cannot be joined as defendants in an action at law;⁹² although there is authority for uniting them in an equity action, when the only relief sought is that of an injunction.⁹³ It has been suggested that the proper course would seem to be to bring separate equity actions and apply to have them tried together.⁹⁴

At times a person, whose acts are connected with the creation of a nuisance, escapes liability on the ground that their causal connection is too remote. If one constructs a lawful work on his land, such as a mill pond, which becomes a nuisance only by reason of the acts of third persons, or by the operation of natural forces, not reasonably to be anticipated, he is not answerable for the nuisance.⁹⁵

507. Defendant's Misconduct Not the Sole Cause of Harm. It is no defense for one who fouls a stream, or the air, or indulges in disturbing noises, that others had been doing the same things

91. *Hyde Park, etc., Co. v. Porter*, C. 45, 1 S. E. 529 (1887); *Chipman* 167 Ill. 276, 47 N. E. 206 (1897); *v. Palmer*, 77 N. Y. 51, 33 Am. R. Simmons v. Everson, 124 N. Y. 319, 566 (1879); *Lull v. Fox, etc., Co.*, 19 26 N. E. 911, 21 Am. St. R. 676 Wis. 100 (1865); *Sadler v. Great* (1891); *Cumminge v. Stevenson*, 76 Wes. Ry. (1895), 2 Q. B. 688, 65 L. Tex. 642, 13 S. W. 556 (1890); *J. Q. B. 26*, affirmed (1896) A. C. Rogers v. Stewart, 5 Vt. 215, 26 Am. 450.

Dec. 296 (1833); *Marine Ins. Co. v. St. Louis, etc., Ry.*, 41 Fed. 643 (1890). But see *Dutton v. Borough of Landsdowne*, 198 Pa. 563, 48 At. 494, 82 Am. St. R. 214, 53 L. R. A. 469 (1901); *Adler v. Pruitt*, 169 Ala. 213, 53 So. 315, 32 L. R. A. N. S. 889 (1910).

92. *Keyes v. Little York Gold Co.*, 450, 16 Am. R. 736 (1872); *Brim-* 53 Cal. 724 (1879); *Ferguson v. berry v. Savannah, etc., Ry.*, 78 Ga. Fermenich Co., 77 Ia. 576, 42 N. W. 641, 3 S. E. 274 (1887); *Covert v.* 448, 14 Am. St. R. 319 (1887); *Cranford*, 141 N. Y. 521, 36 N. E. 597, Evans v. Wilmington, etc., Ry., 96 N. 38 Am. St. R. 826 (1894).

93. *Draper v. Brown*, 115 Wis. 361, 91 N. W. 966 (1902), distinguishing *Lull v. Fox, etc., Co.*, 19 Wis. 100; *Thorpe v. Brumfitt*, L. R. 8 Ch. App. 650 (1873).

94. Garrett, *Law of Nuisances* (2 Ed.) p. 240 (1897).

95. *State v. Rankin*, 3 S. C. 438,

before he began.⁹⁶ Said a learned English judge:⁹⁷ "Where there are many existing nuisances, either to the air or to water, it may be very difficult to trace to its source the injury occasioned by any one of them; but if the defendants add to the former foul state of the water, and yet are not to be responsible on account of its previous condition, this consequence would follow; that if the plaintiffs were to make terms with other polluters of the stream, so as to have water free from impurities produced by their works, the defendants might say: 'We began to foul the stream at a time when, as against you, it was lawful for us to do so, inasmuch as it was unfit for your use, and you cannot now by getting rid of the existing pollutions from other sources, prevent our continuing to do what, at the time when we began, you had no right to object to.' It may be that the defendant's misconduct, if operating simply, would not amount to an actionable nuisance. If, however, a nuisance results from its combination with noise, smoke or obstructions caused by others, the victim is entitled to relief against each of the wrongdoers."⁹⁸

§ 4. REMEDIES FOR NUISANCE.

508. Three Classes. Our law sanctions three forms of remedy for the tort of nuisance — abatement by self-help; an action at law for damages; and equitable relief by injunction.

The first of these remedies has been discussed in a formed connection.⁹⁹ It is, perhaps, well to add that, even when a statute confers the power of self-help upon a municipal corporation, the corporation is not bound to resort to such remedy. It may resort

⁹⁶. *Harley v. Merrill Brick Co.*, 83 Ia. 73, 80, 48 N. W. 1000 (1891); *Euler v. Sullivan*, 75 Md. 616, 23 At. 845, 32 Am. St. R. 420 (1892); *Beach v. Sterling Iron & Zinc Co.*, 54 N. J. Eq. 65, 33 At. 286 (1895); and cases cited.

⁹⁷. Lord Chelmsford, in *Crossley v. Lightowler*, L. R. 2 Ch. App. 478, 481 (1867).

⁹⁸. *Lambton v. Mellish*, (1894) 3 Ch. 163, 63 L. J. Ch. 929, *Thorpe v. Brumfit*, L. R. 8 Ch. App. 650 (1875). Said James, L. J., "Suppose

one person leaves a wheel-barrow standing on a way, that may cause no appreciable inconvenience; but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defense to any one person among the hundred to say, that what he does causes of itself no damage to the complainant." See *Embrey v. Owen*, 6 Exch. 353 (1851); *Richards v. Dougherty*, 13 Ala. 569, 31 So. 934 (1902).
⁹⁹. *Supra*, Chap. V, § 2.

to the courts for judicial redress against the maintainer of the nuisance.¹⁰⁰

509. Action for Damages. This is the form of remedy most frequently resorted to by the nuisance victim. Indeed, if the nuisance is of temporary or intermittent character, or if its interference with a clear legal right of the plaintiff is comparatively trifling, he may be limited to this form of action.¹

The damages recoverable may be either nominal, compensatory or punitive. Oftentimes, nominal damages are all that the plaintiff seeks, in the way of money recovery. His primary object is to secure a judicial affirmance of the legal right, which defendant is invading by the particular nuisance.²

When compensatory damages are sought, for a nuisance that is continuing, the plaintiff is usually limited to such damages as he shows he has sustained, at the time of bringing the action; for "every continuance or repetition of the nuisance gives rise to a new cause of action, and the plaintiff may bring successive actions as long as the nuisance lasts."³

Compensatory damages in the case of a permanent nuisance depreciating the value of property, will be measured ordinarily by the difference between the value of the property without the nuisance and with it.⁴ If the nuisance is temporary, or if a

¹⁰⁰. *Am. Furniture Co. v. Town of Batesville*, 139 Ind. 77, 38 N. E. 408 (1894).

¹. *Goldsmith v. Tunbridge Wells Co.*, L. R. 1 Ch. 349, 355, 35 L. J. Ch. 382 (1866); *Gaunt v. Fynney*, L. R. 8 Ch. App. 8, 42 L. J. Ch. 122 (1872); *Nelson v. Milligan*, 151 Ill. 462, 38 N. E. 239 (1894); *Edwards v. Allonez Mining Co.*, 38 Mich. 46 (1878); *Wahl v. M. E. Cem.*, 197 Pa. 197, 46 At. 913 (1900), and cases cited.

². *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11 (1889), damages fixed by the jury at \$1.00; *Watson v. New Milford Water Co.*, 71 Conn. 442, 42 At. 265 (1899), diversion of water; *Watson v. Town of New Milford*, 72 Conn. 561, 45 At. 167 (1900), nuisance of sewage, but no proof of personal discomfort, or depreciation of property; *Farley v. Gate City Gas L. Co.*, 105 Ga. 323, 31 S. E. 193 (1898), "If a nuisance is shown, the law imports damages;" *Tootle v. Clifton*, 22 O. St. 247 (1871); *Casebeer v. Mowry*, 55 Pa. 419, 93 Am. Dec. 766 (1867), the amount of damages awarded was three cents; *Newark v. Chestnut Hill Land Co.*, 77 N. J. Eq. 23, 75 At. 644 (1910).

³. *Joseph Schlitz Brewing Co. v. Compton*, 142 Ill. 511, 32 N. E. 693 (1892); *Bowers v. Miss., etc., Co.*, 78 Minn. 398, 81 N. W. 208, 79 Am. St. R. 395 (1899); *Uline v. N. Y. C., etc., Ry.*, 101 N. Y. 98, 4 N. E. 536 (1886).

⁴. *Bungenstock v. Nishnabotna Draining Dist.*, 163 Mo. 198, 64 S. W. 140 (1901).

tenant is the plaintiff, the ordinary measure of damages is the diminution of rental value during its continuance.⁵ In case special damages are shown, as the natural and proximate result of the nuisance, these may be recovered. For example, if members of the property owner's family are made sick and services are lost as well as medical expenses are incurred, these form proper items of damage.⁶ So, if crops or trees are destroyed, their value may be recovered.⁷ If patronage is turned away from a hotel by the nuisance, the consequent loss to the proprietor, whether owner or tenant, is a proper item of damage.⁸

Punitive damages may be recovered, when the defendant persists in continuing an unmistakable nuisance, or when his misconduct in connection with it is in any other way wilful or wanton.⁹ Mere negligence on the defendant's part, or a mistake of judgment, or a *bona fide* assertion of his right to maintain what is thereafter adjudged to be a nuisance, will not warrant punitive damages.¹⁰

510. **Relief by Injunction.** The power of a court of equity to command the destruction of a nuisance,¹¹ or to restrain its continuance,¹² is so well established and so frequently and effectively exercised, that the practicing lawyer of to-day is apt to forget "that the jurisdiction of this court over nuisance by injunction at all is of recent growth."¹³ Less than a century ago, Lord Eldon

5. *Swift v. Broyles*, 115 Ga. 885, 42 S. E. 277 (1902); *Bly v. Edison Electric Co.*, 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500 (1902); *Herbert v. Rainey*, 162 Pa. 525, 29 At. 725 (1894).

6. *Lockett v. Ft. Worth, etc., Ry.*, 78 Tex. 211, 14 S. W. 564 (1890).

7. *Robb v. Carnegie Bros. & Co.*, 145 Pa. 324, 341, 22 At. 649, 14 L. R. A. 329 (1891); *Ducktown Sulphur, etc., Co. v. Barnes*, (Tenn.) 60 S. W. 593 (1900).

8. *Keiser v. Mahoney City Gas Co.*, 143 Pa. 276, 22 At. 759 (1891).

9. *Paddock v. Somes*, 51 Mo. App. 320 (1892); *Keiser v. Mahoney*, 143 Pa. 276, 291, 22 At. 759 (1891).

10. *Morford v. Woodworth*, 7 Ind. 83 (1855); *Willett v. St. Albans*, 69 Vt. 330, 38 At. 72 (1897).

11. *Kelk v. Pearson*, L. R. 6 Ch. 809 (1871).

12. *Henderson v. N. Y. C. Ry.*, 78 N. Y. 423 (1879). In this case, plaintiff sought damages, an abatement of the use of the railroad and an injunction restraining its operation.

13. *Ripon, Earl of, v. Hobart*, 3 M. & K. 169, 180 (1834). Lord Brougham added, that this "jurisdiction had not till very lately been much exercised, and has at various times found great reluctance on the part of learned judges to use it, even in cases," where plaintiff's injury was clear and great.

expressed the view that an injunction should never be issued, until the existence of the nuisance had been established by a trial.¹⁴

This view no longer obtains, but a court of equity, when asked to prevent a threatened nuisance, or to enjoin an existing one, or to command its destruction or abatement, requires the complainant to make out "a case of strong and clear injustice, of pressing necessity, and imminent danger of great and irreparable damage, and not of that nature for which an action at law would furnish a full and adequate remedy."¹⁵ It has been judicially declared to be "the rule in equity that where the damages sustained can be measured and compensated, equity will not interfere where the public benefit greatly outweighs private and individual inconvenience."¹⁶

In cases where the plaintiff goes into equity to enjoin the existence and continuance of a nuisance, he may claim and recover damages also. If his complaint enables the court to take jurisdiction of his entire controversy with the defendant, and settle and adjust all matters of difference between them touching the nuisance, a decree abating the nuisance, but making no provision for damages, will bar a subsequent action at law to recover such damages. In such cases, it is held that the plaintiff may recover, in the equity suit, damages down to the time of trial.¹⁷

While there is considerable hesitation in granting an injunction against a person's using his property in the prosecution of a law-

14. *Att'y Gen. v. Cleaver*, 18 Ves. 211 (1811). "The instances of the interposition of this court," said Lord Eldon, "upon the subject of nuisance are very confined and rare." In *Att'y Gen. v. Nichol*, 16 Ves. 338 (1809), the injunction was dissolved upon defendant's giving an undertaking to remove the nuisance, if the case at law went against him. See *infra*, Chap. XVII.

15. *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 78 (1866); *Health Dep't of N. Y. v. Purdon*, 99 N. Y. 237, 52 Am. R. 22 (1885); *Penn Lead Co.'s Appeal*, 96 Pa. 116, 20 Am. L. Reg. 649, 23 A. L. J. 209 (1881).

16. *Daniels v. Keokuk Water Works*, 61 Ia. 549, 16 N. W. 705 (1883); *Gallagher v. Flury*, 99 Md. 181, 57 At. 672 (1904); *Upjohn v. Board of Health*, 46 Mich. 542, 9 N. W. 845 (1881). In *Att'y Gen. v. Doughty*, 2 Ves. Sr. 453 (1752), Lord Hardwicke said, "I know of no general rule of common law which says that building so as to stop another's prospect is a nuisance. Was that the case, there would be no great cities; and I must grant injunctions to all the new buildings in this town."

17. *Gilbert v. Boak Fish Co.*, 86 Minn. 365, 90 N. W. 767, 58 L. R. A. 735, and cases cited in note (1902).

ful business,¹⁸ yet, when a case of nuisance is clearly established, the court will not, as a rule, undertake to balance the injuries of plaintiff and defendant.¹⁹

18. *Bristol v. Palmer*, 83 Vt. 54, 74 of a million dollars and employed At. 332 (1909), injunction granted; about 500 operators; annual damage *Nowak v. Baier*, 78 N. J. Eq. 112, 77 to plaintiff's firm from \$100 to \$300 At. 1062 (1910), injunction denied. a year. Injunction granted. Follow-

19. *Whalen v. Union Bag & Paper* ing *Western Paper Co. v. Pope*, 155 Co., 208 N. Y. 1, 101 N. E. 805 (1913), Ind. 394, 57 N. E. 719, 56 L. R. A. 899 pollution of stream by defendant, (1900). whose mill represented an investment

CHAPTER XV.

NEGLIGENCE.

§ 1. NATURE OF THE TORT.

511. Negligence Is Relative. A learned court has recently declared that "negligence is not a thing but a relation. It implies a duty to use diligence, and such a duty may be owed to one person and not to another."¹ Another court has said: "Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and when it has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term."² Still another court has said: "In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled."³

Accordingly, a plaintiff does not make out a cause of action for negligence by showing that the defendant has acted carelessly, or violated a duty towards some one, and that the plaintiff has suffered damage therefrom. He must show that he had a legal right to care and caution on the part of the defendant, which right was violated to his injury by the defendant.⁴ That violation, it is true, may result either from omission or commission;⁵ but neither

¹ *Boston & M. Ry. v. Sargeant*, 72 N. H. 455, 57 At. 688 (1904), quoting from *Rigby L. J. in Mowbray v. Merryweather* (1895), 2 Q. B. 640, 647, 65 L. J. Q. B. 50.

² *Sweeny v. Old Col., etc., Ry.*, 10 Allen (92 Mass.) 368 (1865). Defendant was held to have induced plaintiff to cross the tracks, and was thereby under a duty of care towards him; *Indianapolis Abattoir Co. v. Neidlinger*, 174 Ind. 400, 92 N. E. 169 (1910); *Leighton v. Wheeler*, 106 Me. 450, 76 At. 916 (1910).

³ *Tonawanda Ry. v. Munger*, 5 Den. (N. Y.) 255, 49 Am. Dec. 239 (1848). In this case the animals of plaintiff below trespassed upon the R. R. track, and were killed. In *Morris v. Brown*, 111 N. Y. 318, 326, 18 N. E. 722, 7 Am. St. R. 751 (1888), it is said: "But the duty to be actively cautious and vigilant is relative, and where that duty has no existence be-

⁴ *Smith v. Tripp*, 13 R. I. 153 (1880).

⁵ *Railroad Co. v. Jones*, 95 U. S.

doing nor failing to do a particular thing is a tort, unless it invades some person's legal rights.⁶

512. Liability Without Negligence. As a rule, the common law does not impose legal liability upon one who inflicts harm upon another as an incident of a lawful business carried on without negligence.^{6a} Such liability has been imposed by statutes some of which have been declared unconstitutional,^{6b} while others have been upheld as a valid exercise of the police power.^{6c}

513. Distinguishable from Intentional Wrongdoing. Negligence is of a negative character. It does not involve the idea of a willful or intentional act or omission on the part of another. The harm which it causes is not designed but inadvertent. The distinction between negligence and fraud has been stated as follows: "Fraud is a deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some way to do him an injury. It is always positive; the mind concurs with the act; what is done, is done designedly and knowingly. But in negligence, whatever may be its grade, there is no purpose to do a wrongful act, or to omit the performance of a duty. There is, however, an absence of proper attention, care or skill. Negligence, in its various degrees, ranges between pure accident and actual fraud, the latter commencing where negligence ends;"⁷ though it is said, that "an act may be so grossly negligent that it may be

439, 24 L. Ed. 506 (1887). In this case, the railroad company's negligence of omission was held not to avail Jones, because the company did not owe him any duty of diligence.

6. *Smith v. Trimble* (Ky.), 64 S. W. 915 (1901); *McCaughna v. Owosso, etc., Co.*, 129 Mich. 407, 89 N. W. 73 (1902); *Kelly v. Mich. Cen. Ry.*, 65 Mich. 186, 31 N. W. 904, 8 Am St. R. 876 (1887), "Negligence is in law a relative term, and implies the non-observance or omission to perform a duty which is prescribed by law, or it arises from the situation of the parties and circumstances surrounding the

transaction;" *Sias v. Rochester Ry.*, 169 N. Y. 118, 62 N. E. 132, 56 L. R. A. 850 (1901); *Baltimore & O. Ry. v. Cox*, 66 O. St. 276, 64 N. E. 119 (1902); *Dobbins v. M. K. & T. Ry.*, 91 Tex. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. R. 856 (1897).

6a. *Supra*, chap. III, § 7.

6b. *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. N. S. 162 (1911).

6c. *Jensen v. South Dak. C. Ry.*, 25 S. D. 506, 127 N. W. 650, 35 L. R. A. N. S. 1015 (1910), and cases cited in opinion and in note.

7. *Beardsley, J.*, in *Gardner v. Heartt*, 3 Den. (N. Y.) 232, 236 (1846).

presumed to have been willfully or intentionally done.”⁸ It has also been said, “While the term ‘willful and wanton negligence’ means something more than simply ‘negligence,’ or even ‘gross negligence,’ it does not include the element of malice, or an actual intent to injure another.”⁹

514. Degrees of Negligence. Whether negligence is divisible into degrees, corresponding to degrees of care incumbent on the defendant, is a question which has elicited much discussion and a great variety of opinions. Speaking broadly, the various theories may be reduced to three classes: First, that there are three degrees of care required by the law, slight, ordinary and great; and consequently there are three degrees of negligence,—gross, or the failure to exercise even slight care; ordinary, or the failure to exercise ordinary care; and slight, or the failure to exercise great care.¹⁰

Second, that but two degrees of care are required; the care ordinarily exercised by a specialist in the matter in hand, and the care ordinarily exercised by a non-specialist in the same matter. A failure to exercise the former of these degrees of care is termed ordinary negligence, while a failure to exercise the latter kind of care is termed slight negligence.¹¹

Third, that there are no degrees of care or of negligence; that “negligence is, in all cases, the same thing, namely, the absence of due care.” According to this view, “it is in each case practically a question of fact for the jury, whether the proper degree of care has been taken—the jury being guided by considerations of what a reasonable and prudent man would have done under the circumstances.”¹²

8. *Hays v. Railway*, 70 Tex. 602, 8 S. W. 491, 8 Am. S. R. 624 (1888).

9. *Sloniker v. Great Nor. Ry.*, 76 Minn. 306, 79 N. W. 168 (1899). “Where a person discovers another in a position of peril, although the latter is a trespasser, and negligently placed himself in such position, and the former, after so discovering him, can by the exercise of ordinary care avoid injuring him, but omits to do so, he evinces such reckless disregard of the

safety of others as to constitute, in law, willful and wanton negligence.”

10. *Sherman and Redfield, Negligence* (5th Ed.), chap. III; *Whitaker's Smith, Negligence* (2d Ed.), pp. 22-25.

11. *Wharton, Negligence* (2d Ed.), § 636.

12. *Clerk and Lindsell, Torts* (2d Ed.), p. 393. In *Wilson v. Brett*, 11 M. & W. 115, 12 L. J. Ex. 264 (1843), *Rolfe, B.*, said, “I can see no difference between negligence

insurers of the safety of those, who are likely to be harmed by the prosecution of their business; but they are bound to exercise an extraordinary degree of care, as we shall see hereafter—a degree of care commensurate with the risk to which their business subjects others.

An example of liability for ordinary negligence is afforded by the landowner who impliedly invites persons upon his premises. The measure of his duty is to exercise reasonable prudence and care.²²

§ 2. PROVING NEGLIGENCE.

517. Burden of Proof. The litigant who bases his case or his defense upon negligence, is bound to prove that his opponent was negligent. The presumption of law is that every person performs his legal duty.²³ Accordingly, the burden of proving negligence, in any litigation, rests throughout the case on the party asserting it; although, as in other cases, the burden of giving evidence may shift from one side to the other, during the progress of the trial. If an ordinary bailee of goods for hire is sued for their loss, the bailor makes out a *prima facie* case of negligence by evidence of the bailee's failure to return the goods upon demand. If the bailee then shows that the goods were stolen from him or destroyed, the *prima facie* case is met, and plaintiff must go further and prove that the loss was due to "some negligence or want of care, such as a prudent man would take under similar circumstances of his own property."²⁴

22. *Griffen v. Manice*, 166 N. Y. 188, 198, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. R. 630 (1901), distinguishing the liability of a landowner for defects in a passenger elevator, used for the convenience of those visiting the building, from the liability of the common carrier of passengers.

23. *Huff v. Austin*, 46 O. St. 386, 387, 21 N. E. 864, 15 Am. St. R. 613 (1889).

24. *Claffin v. Meyer*, 75 N. Y. 260, 31 Am. R. 467 (1878). In *Tex. & P. Ry. v. Barrett*, 166 U. S. 617, 619,

17 Sup. Ct. 707, 41 L. Ed. 1136 (1896), it is said of an employee, who sues his employer for failure to provide suitable appliances: "The burden of proof is on the plaintiff throughout the case to show, that the boiler and engine, which exploded, were improper appliances to be used on its railroad by defendant; and that by reason of the particular defects, pointed out and insisted on by plaintiff, the boiler exploded and injured him;" *Norfolk, etc., Ry. v. Cromer*, 99 Va. 763, 40 S. E. 54 (1901).

518. Presumption, when Contract Is Broken. The same evidence may or may not establish a *prima facie* case of negligence on the part of the defendant, according as it shows a breach of contract on the defendant's part or not. For example, a stage coach upsets;²⁵ or a railroad train is suddenly jolted;²⁶ or a steamship is thrown with extraordinary force against a wharf;²⁷ or a train is derailed by obstacles on the track, or by defective rails or defective rolling stock;²⁸ and a passenger is injured. The accident itself affords *prima facie* evidence of the carrier's negligence, for he contracted to carry the passenger safely. Had a servant of the carrier been harmed in the same accident, "a different rule would obtain in his case. The fact of accident would carry with it no presumption of negligence, on the part of the employer;" and the employee would be bound to establish, as an affirmative fact, that the employer had been guilty of negligence.²⁹ The doctrine applied above against a common carrier has been applied in favor of a guest against an innkeeper.^{29a}

A similar difference is generally recognized "between actions founded in negligence, where a contract relation existed between the parties, and those in which the defendant owed no duty, other than to use such ordinary care and caution, as the nature of the business demanded to avoid injury to others."³⁰

25. *Stokes v. Saltonstall*, 13 Pet. U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. (U. S.) 181, 10 L. Ed. 115 (1839); *Boyce v. Cal. Stage Co.*, 25 Cal. 460 (1864); *Wall v. Livezey*, 6 Col. 465 (1882).

26. *Railroad Co. v. Pollard*, 22 Wall. (U. S.) 341, 22 L. Ed. 877 (1874). In *Loudon v. Eighth Ave. Ry.*, 162 N. Y. 380, 56 N. E. 988 (1900), the plaintiff joined two street car companies in an action for injuries sustained in a collision. The court held that a presumption of negligence was raised against the Eighth Ave. Co., by the fact of the collision, as the plaintiff was its passenger; but no such presumption arose against the other company.

27. *Inland, etc., Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270 (1890).

28. *Gleeson v. Virginia Mid. Ry.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458 (1890); *Virginia C. Ry. v. Sanger*, 15 Gratt. (Va.) 230 (1859). **29.** *Patton v. Texas & P. Ry.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361 (1900); *Mountain Copper Co. v. VanBuren*, 123 Fed. 61, 59 C. C. A. 279 (1903).

29a. *Palace Hotel Co. v. Medart*, 87 O. St. —, 100 N. E. 317 (1912). **30.** *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 126, 25 N. E. 259, 19 Am. St. R. 475 (1890); *Huff v. Austin*, 46 O. St. 386, 21 N. E. 864, 15 Am. St. R. 613 (1889); *Thompson, S. D.*, in 10 Cen. L. J. 261 (1880); *Spees v. Boggs*, 198 Pa. 112, 47 At.

519. Res Ipsa Loquitur. Except in cases, where the defendant has bound himself by contract to do something safely, or where a valid statute imposes a similar obligation,³¹ the phrase, *res ipsa loquitur*, is rarely to be applied literally. In other words, the plaintiff rarely makes out a case of negligence by merely showing that some harm has been inflicted upon him by an accident, in connection with the defendant's affairs. To quote from a modern decision:³² "In no instance can the bare fact that an injury has happened, of itself and divorced from all surrounding circumstances, justify the inference that the injury was caused by negligence. It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred. * * * This phrase (*res ipsa loquitur*), which literally translated means that the 'thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident."³³

875, 52 L. R. A. 933, 82 Am. St. R. 792 (1901); *Velth v. Hope Salt Co.*, 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410 (1902).

31. *Atchinson, etc., Ry. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909 (1898); *Clark v. Russell*, 97 Fed. 900, 38 C. C. A. 541 (1899), referring to statutes imposing liability upon railroad companies wholly independent of negligence; *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662 (1900); *Marino v. Lehmaier*, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811 (1903); *True & True Co. v. Woda*, 201 Ill. 315, 66 N. E. 369 (1903), violation of city ordinance as to height of lumber piles; *Chesley v. Nantasket, etc., Co.*, 179 Mass. 469, 61 N. E. 50 (1901), violation of act of Congress as to sounding bell or foghorn; *Jones v. Ill. Central Ry.*, 75 Miss. 970, 23 So. 358 (1898), violation of ordinance as to speed of train; *Elmore v. Seaboard, etc., Co.*, 132 N.

C. 865, 44 S. E. 620 (1903), violation of statute requiring automatic couplings; *Kelley v. Anderson*, 15 S. D. 107, 87 N. W. 579 (1901), violation of statute as to setting stubble fires in certain months; *Norfolk Ry. v. Corletto*, 100 Va. 355, 41 S. E. 740 (1902), violation of statute as to speed of train. In all of these cases it was held, that a *prima facie* case of negligence is made out, by evidence of the violation of the statute or ordinance.

32. *Benedick v. Potts*, 88 Md. 52, 40 At. 1067, 41 L. R. A. 478 (1898).

33. *City of Atlanta v. Stewart*, 117 Ga. 144, 43 S. E. 443 (1903); *Byrne v. Boadle*, 2 H. & C. 722, 33 L. J. Ex. 13 (1863); *Kearney v. London, etc., Ry.*, L. R. 5 Q. B. 441 (1870), L. R. 6 Q. B. 759, 40 L. J. Q. B. 285 (1871); *Cummings v. Nat'l Furnace Co.*, 60 Wis. 603, 18 N. W. 742, 20 N. W. 665 (1884); *Irvine v. Del., L. & W. Ry.*, 184 Fed. 665, 106 C. C. A. 600 (1911), accord.

520. A plaintiff who shows that he was injured by the falling of a building into the street,³⁴ or by the falling of the pole of a toll-gate as he was passing thereunder,³⁵ makes out a *prima facie* case of negligence; while one who proves that he was injured by the bursting of a fly-wheel used by the defendant,³⁶ or the bursting of a boiler or engine,³⁷ or the fall of an elevator,³⁸ does not make out such a case. In the one set of cases, the circumstances are such as to afford just ground for a reasonable inference that according to ordinary experience, the accident would not have occurred except for want of due care; while in the other set, they do not warrant such an inference.³⁹

521. **Functions of Court and Jury.** A learned English writer, after alluding to the fact that the discussions concerning the several functions of the court and the jury, in negligence cases, have not been carried on by modern judges in the manner best fitted to promote the clear statement of principles, and declaring that it is difficult to sum up the results of these discussions or to reconcile them, expresses the opinion that the tendency of modern ju-

- 34.** *Mullen v. St. John*, 57 N. Y. 567, 15 Am. R. 530 (1874); *Murray v. McShane*, 52 Md. 217, 36 Am. R. 369 (1879), a brick fell on plaintiff from defendant's dilapidated wall.
- 35.** *Hyde's Ferry Turnpike Co. v. Yates*, 108 Tenn. 428, 67 S. W. 69 (1902).
- 36.** *Piehl v. Albany Ry.*, 162 N. Y. 617, 57 N. E. 1122 (1900).
- 37.** *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. R. 623 (1873); *Marshall v. Wellwood*, 38 N. J. L. 339, 20 Am. R. 394 (1876).
- 38.** *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. R. 630 (1901). *Accord*, *Ferguson v. Eldlitz*, 195 N. Y. 248, 88 N. E. 33 (1909). *Contra*, *Edwards v. Manufacturers' B. Co.*, 27 R. I. 248, 61 At. 646, 2 L. R. A. N. S. 744 (1905).
- 39.** *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718 (1895); *Wadsworth v. Boston El. Ry.*, 182 Mass. 572, 66 N. E. 421 (1903); *Johnson v. Walsh*, 83 Minn. 74, 85 N. W. 910 (1901); *Paynter v. Bridgeton, etc., Co.*, 67 N. J. L. 619, 52 At. 367 (1902); *Cole v. N. Y. Bottling Co.*, 23 App. Div. 177 (1897); *Weidner v. N. Y. El. Ry.*, 114 N. Y. 462, 21 N. E. 1041 (1889); *Volkmar v. Man. Ry.*, 134 N. Y. 418, 31 N. E. 870, 30 Am. St. R. 678 (1892); *Shafer v. Lacock*, 168 Pa. 497, 32 At. 44, 29 L. R. A. 254 (1895); *Stearns v. Ontario Spinning Co.*, 184 Pa. 519, 39 At. 292, 63 Am. St. R. 807 (1898); *Richmond, etc., Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736 (1902); *The Joseph B. Thomas*, 86 Fed. 658, 30 C. C. A. 333, 56 U. S. App. 619, 46 L. R. A. 58 (1898).

dicial rulings in England have been, if not to enlarge the province of the jury, to arrest the process of curtailing it.⁴⁰

It is doubtful whether the same tendency exists in this country.⁴¹ True, courts will not lightly take cases from the jury. "Jurors are the recognized triers of questions of fact, and, ordinarily, negligence is so far a question of fact as to be properly submitted to and determined by them. At the same time the judge is primarily liable for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that the jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instruction to that effect, an appellate court will pay large respect to his judgment."⁴²

522. An admirable discussion of this topic is to be found in a modern Connecticut case,⁴³ an outline of which is presented in the headnotes as follows: "The conception of negligence involves the idea of a duty to act in a certain way towards others and a violation of that duty by acting otherwise. It involves the existence of

40. Pollock, *Torts* (6th Ed.), p. 426.

41. *Hunter v. Cooperstown & S. V. Ry.*, 112 N. Y. 371, 19 N. E. 820, 8 Am. St. R. 75, 2 L. R. A. 832 (1889); s. c. again 126 N. Y. 18, 26 N. E. 958, 12 L. R. A. 429 (1891). The judgment on a verdict for the plaintiff was reversed, because in the opinion of a majority of the Court of Appeals (a majority of four to three when the case was before that court the second time), the evidence failed to make out a case of negligence on the part of the defendant, and did clearly establish contributory negligence on plaintiff's part. *Gavett v. Man. & L. Ry.*, 16 Gray (82 Mass.), 501, 77 Am. Dec. 422 (1860), affirming a

judgment on a verdict directed by the trial court in defendant's favor, on the ground that there was no proof of due care, and no facts were shown from which an inference of such care could by any possibility be drawn by reasonable men; *Nolan v. Newton*, 206 Mass. 384, 92 N. E. 505 (1910).

42. *Brewer, J.*, in *Patton v. Texas, etc., Ry.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361 (1900), affirming a judgment upon a verdict for defendant, directed by the trial judge, and affirmed by the Circuit Court of Appeals.

43. *Farrell v. Waterbury Horse Ry.*, 60 Conn. 239, 21 At. 675, 22 At. 544 (1891).

a standard with which the given conduct is to be compared and by which it is to be judged.⁴⁴

Where this standard is fixed by law, the question whether the conduct in violation of it is negligence, is a question of law. And where the standard is fixed by the general agreement of men's judgments, the court will recognize and apply the standard for itself.⁴⁵

But where it is not so prescribed or fixed, but rests on the particular facts of the case and is to be settled for the occasion by the exercise of human judgment upon these facts, as where the standard is the conduct in the same circumstances of a man of ordinary prudence, there the question is one of fact and not of law."⁴⁶

§ 3. CONTRIBUTORY NEGLIGENCE.

523. Consequences of. At common law, contributory negligence on the part of the plaintiff is an absolute bar to his recovery. In the language of a learned judge:⁴⁷ "In an action for injuries arising from negligence, it always was a defense that the plaintiff had failed to show that, as between him and the defendants, the injury had happened solely by the defendant's negligence. If the plaintiff by some negligence on his part directly contributed to the injury, it was caused by the joint negligence of both, and no longer by the sole negligence of the defendant, and that formed a defense."

Such is not the consequence of contributory negligence in an admiralty action. "In the case of a collision between two vessels by the fault of both, the maritime law everywhere, by what has been called the *rusticum judicium*, apportions equally between both vessels the damages done to both."⁴⁸ It often happens that the

44. *Detroit & M. Ry. v. Van Steinburg*, 17 Mich. 99, 119-123 (1868); *Crawford*, 24 O. St. 631, 15 Am. R. 633 (1874).

Fernandes v. Sac City Ry., 52 Cal. 45, 50 (1877). **46.** *McCully v. Clarke*, 40 Pa. 399, 80 Am. Dec. 584 (1861): "When

45. *Solomon v. Manhattan Ry.*, 103 N. Y. 437, 442, 9 N. E. 430, 57 Am. R. 760 (1866): "It is, we think, the general rule of law, that the boarding or alighting from a moving train is presumably and generally a negligent act *per se*;" *the standard of care shifts with the circumstances of the case, it is in its very nature incapable of being determined as a matter of law and must be submitted to a jury.*"

Fleming v. Wes. Pac. Ry., 49 Cal. 253 (1874). *Cleveland, etc., Ry. v.* **47.** Lord Esher, M. R., in *Thomas v. Quatermaine*, L. R. 18 Q. B. 685, 56 L. J. Q. B. 340 (1887).

48. *Ralli v. Troop*, 157 U. S. 386,

plaintiff has his option of suing, either in a common law tribunal or in an admiralty court. In such cases he should not hesitate to go into admiralty, if there is any possibility of contributory negligence on his part.⁴⁹

524. Burden of Proof. Whether contributory negligence is an affirmative defense, or whether the plaintiff is bound to show, as a part of his case, that he was free from contributory negligence, is a question upon which the courts are divided. In England, it is well settled "that the onus of proving affirmatively that there was contributory negligence on the part of the person injured, rests, in the first instance, upon the defendant, and that in the absence of evidence tending to that conclusion, the plaintiff is not bound to

406, 15 Sup. Ct. 657, 39 L. Ed. 742 (1894), citing *The North Star*, 106 U. S. 17 (1882), which held that if the losses were unequal, the entire damage was to be divided equally between the vessels, and half the difference between their respective losses was to be decreed in favor of the one that suffered most, so as to equalize the burden; and *the Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586 (1890), which left open the question whether the decree should be for exactly one-half the damages, where the defendant suffered no harm, or whether a greater or less portion might be decreed, according as the plaintiff was more or less negligent than defendant. See *The Victory*, 68 Fed. 395 (1895), and *Wm. Johnson Co. v. Johansen*, 86 Fed. 886 (1898), approving the view, that the liability of a marine tortfeasor should be measured by his degree of fault; *The Eugene F. Moran*, 212 U. S. 466, 29 Sup. Ct. 339 (1909); "The division of damages in admiralty extends to what one of the vessels pays to the owners of cargo on the other vessel jointly in fault." *Erie Ry. Co. v. Erie & W. Trans.*

Co., 204 U. S. 220, 29 Sup. Ct. 246 (1907).

49. In *Atlee v. Packet Co.*, 21 Wall. (U. S.) 389, 395, 22 L. Ed. 619 (1874), the court said: "The plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case notwithstanding the concurrent right to sue at law. In this court, the course of proceeding is, in many respects, different and the rules of decision are different. The mode of pleading is different; the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference, as regards this case, is the rule for estimating damages. . . . This rule of the Admiralty commends itself quite as favorably in its influence in securing practical justice, as the common law rule."

In some States, the admiralty rule, or its equivalent, has been adopted by statute. See Ala., etc., *Ry. v. Coggins*, 88 Fed. 455 (1898), applying §§ 2972, 3034, of the Georgia Code; Thornton's Federal Employers' Liability and Safety Appliance Acts, for Federal and State Statutes on this topic.

prove the negative in order to entitle" him to recover.⁵⁰ The same rule has been laid down by the Supreme Court of the United States⁵¹ and by the courts of last resort in a majority of our States.⁵²

525. In many jurisdictions, however, the burden is held to be upon the plaintiff of showing affirmatively, either by direct evidence or by the drift of surrounding circumstances, his freedom from contributory negligence. The reasoning leading to this conclusion is fairly indicated in the following extract from a Connecticut case: "It is necessary for the plaintiff to prove, first, negligence on the part of the defendant; and second, that the injury to the plaintiff occurred in consequence of that negligence. But in order to prove this latter point, he must show that such injury was not caused, wholly, or in part by his own negligence; for although the defendant was guilty of negligence, if the plaintiff's negligence contributed essentially to the injury, it is obvious that it did not occur by reason of defendant's negligence. Hence, to say that the plaintiff must show the absence of contributory negligence, is only saying that he must show that the injury was owing to the negligence of the defendant." ⁵³

50. Lord Watson in *Wakelin v. London & S. W. Ry.*, 12 App. Cas. 41, 47, 56 L. J. Q. B. 229 (1886). It is said that Lord Esher is the only English judge, who has supported the opposite doctrine. Clerk & Lindsell, *Torts* (2d Ed.); p. 438 n. (1).

51. *Inland, etc., Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270 (1890).

52. See Chap. XV., Beach, *Contributory Negligence* (2d Ed.), where the authorities are classified analyzed and discussed with ability. Alabama, Arizona, Arkansas, California, Colorado, Georgia, Idaho, Kansas, Kentucky, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont,

West Virginia, Utah and Wisconsin follow the U. S. Supreme Court. In *Weiss v. Penn. Ry.*, 79 Pa. 387, 390 (1875), Sharswood, J., says, "The presumption of law is that the prudent man would do under the circumstances" to save himself from harm. Mr. Beach declares (section 423) that the statistics of litigation show that no such presumption ought to be indulged in by the courts. "When the average plaintiff comes into court with his action of negligence, the mathematical chance is more than six to one, at the very lowest, that when the evidence is all in, it will give the defendant the verdict on the ground of plaintiff's own concurring and participating default."

53. *Park v. O'Brien*, 23 Conn. 339,

Of course, in either class of jurisdictions, if the plaintiff's own evidence discloses contributory negligence on his part, his case breaks down, and the defendant is entitled to a verdict or nonsuit.⁵⁴

Modern legislation has abolished the defense of contributory negligence or modified it, in certain cases.^{54a}

526. What amounts to contributory negligence within the rule which bars the plaintiff's recovery, in cases where it exists, is a question which gave the courts considerable trouble for a time, but which appears to be fairly well settled now, on both sides of the Atlantic.^{54b} The older view in England,⁵⁵ and one which still obtains in a few jurisdictions in this country,⁵⁶ is that any negligence on the part of the plaintiff which can be said to have a causal connection with his injury, whether remote or proximate, is to be deemed contributory negligence within the rule. In other words, the plaintiff is bound to prove that the harm was due solely to defendant's negligence.

527. The present view is, that contributory negligence which

345 (1852). In *Brocket v. Fair Haven & W. Ry.*, 73 Conn. 428, 433-4, 47 At. 763 (1900), it is said, "When an injury to one results from the fault of both, the equitable rule would be that each should suffer in proportion to his wrong. But, on grounds of public policy, the law has established an arbitrary rule that when the injury complained of has been caused by the culpable negligence of both plaintiff and defendant, it has not been caused by the defendant, and so the plaintiff cannot recover for the injury. This arbitrary rule not only affects a right of action, but operates as a rule of evidence." Other States following this doctrine are, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Mississippi, New York and North Carolina.

54. *Ryan v. Louisville, etc., Ry.*, 44 La. Ann. 806, 11 So. 30 (1892); *Baltimore, etc., Ry. v. Whitacre*, 35

O. St. 627 (1880); *Tolman v. Syracuse, etc., Ry.*, 98 N. Y. 198, 50 Am. R. 649 (1885); *Weiss v. Penna. Ry.*, 79 Pa. 387 (1875).

54a. It is impossible here to describe this legislation in detail, and the learned reader is referred to such works as Thornton's *Federal Employers' Liability and Safety Appliance Acts* (2d Ed.), and Boyd's *Workmen's Compensation*.

54b. *Swords v. West Brownsville*, 233 Pa. 533, 82 At. 780 (1912).

55. *Martin v. Great Nor. Ry.*, 16 C. B. 179, 3 C. L. R. 817 (1855); Brett, J.'s charge to the jury, in *Radley v. London, etc., Ry.*, as given in 1 App. Cas., at p. 755 (1876).

56. *Norfolk & W. Ry. v. Cromer*, 99 Va. 763, 40 S. E. 54 (1901); "The question to be determined in every case is not whether the plaintiff's negligence caused, but whether it contributed to the injury of which he complains."

defeats the plaintiff is negligence on his part, which is a proximate cause of his harm. In a leading English case,⁵⁷ the following charge to the jury was held to contain an accurate statement of the true doctrine: "If both parties were equally to blame, and the accident was the result of their joint negligence, the plaintiff could not be entitled to recover; that, if the negligence or default of the plaintiff was in any degree the proximate cause of the damage, he could not recover, however great may have been the negligence of the defendant; but that, if the negligence of the plaintiff was only remotely connected with the accident, then the question was whether the defendant might not, by the exercise of ordinary care, have avoided it."⁵⁸

The Supreme Court of the United States has declared⁵⁹ that the generally accepted and most reasonable rule of law applicable to actions in which the defense is contributory negligence, may be thus stated: "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained, if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years, that the contributory negligence of the party injured will not defeat the action, if it be shown that defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."⁶⁰

57. *Tuff v. Warman*, 2 C. B. N. S. 740 (1857), 5 C. B. N. S. 573, 27 L. J. C. P. 322 (1858).

58. Approved in *Radley v. London, etc., Ry.*, 1 App. Cas. 754, 46 L. Ex. 573 (1876), declaring incorrect, Mr. Justice Brett's direction to the jury, that plaintiff must satisfy them, that the harm happened solely by defendant's negligence. In *Spaight v. Tedcastle*, 6 App. Cas. 217, 219 (1891), Selborne, L. C., said: "Great injustice might be done, if in applying the doctrine of contributory negligence to a case of this sort (a collision between a ship and a tug), the maxim, *causa proxima, non remota, spectatur*, were lost sight of. * * *

sion ought not to be regarded as contributory negligence if it might, in the circumstances which actually happened, have been unattended by danger, but for the defendant's fault; and if it had no proper connection, as cause, with the damage which followed as its effect."

59. *Grand Trunk Ry. v. Ives*, 144 U. S. 408, 429, 12 Sup. Ct. 679, 36 L. Ed. 485 (1892).

60. The following are a few of the cases which hold that contributory negligence must be the proximate cause of the harm: *Purcell v. Chicago, etc., Ry.*, 109 Ia. 629, 80 N. W. 682, 77 Am. St. R. 557 (1899); *Ward v. Maine C. Ry.*, 96 Me. 136, 51 Atl.

528. The Last Clear Chance. The qualification, mentioned in the foregoing extract, is often spoken of as the "doctrine of the last clear chance." A recent writer,⁶¹ after an exhaustive examination of modern decisions, summarizes the result as follows: "The foregoing review of authorities, while disclosing much difference of opinion with reference to the ultimate question as to defendant's liability to one guilty of negligence, under a given set of facts and circumstances, seems nevertheless, when proper distinctions are observed, to show a decided tendency on the part of the courts to apply the doctrine of the last clear chance to any omission of duty on the part of defendant, whether before or after discovering the peril in which the plaintiff or deceased had placed himself, or his property, by his antecedent negligence, if the breach of duty intervened or continued after the negligence of the other party had ceased. The criticism that is often made, that the doctrine of the last clear chance in effect abrogates the doctrine of contributory negligence, does not seem to be well founded."⁶²

529. Cause of Danger Distinguished from Cause of Harm. It often happens that a person puts himself in a place which he knows to be dangerous, or conducts himself without due care in

947 (1902); *Holwerson v. St. Louis*, 465; note in 12 *Columbia Law Re-etc.*, Ry., 157 Mo. 216, 57 S. W. 770, view 729.

50 L. R. A. 850 (1900); *Oates v. Met-St. Ry.*, 168 Mo. 535, 68 S. W. 906, 58 L. R. A. 447 (1902); *Costello v. Third Ave. Ry.*, 161 N. Y. 317, 55 N. E. 897 (1900); *Rider v. Syracuse, etc., Ry.*, 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125 (1902), see dissenting opinion; *Wheeler v. Grand Trunk Ry.*, 70 N. H. 607, 50 At. 103 (1901); *Doolittle v. Southern Ry.*, 62 S. C. 130, 40 S. E. 133 (1901); *Cooper v. Georgia C. & N. Ry.*, 61 S. C. 345, 39 S. E. 543 (1901); *Chatanooga Light & Power Co. v. Hodges*, 109 Tenn. 331, 70 S. W. 616 (1902); *Internat., etc., Ry. v. Williams*, 20 Tex. Civ. App. 587, 50 S. W. 732 (1899); *Mauch v. City of Hartford*, 112 Wis. 40, 87 N. W. 816 (1901).

⁶² *Harrington v. Los Angeles Ry.*, 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238 (1903); *Western & A. Ry. v. Ferguson*, 113 Ga. 708, 39 S. E. 306 (1901); *Bogan v. Carolina Ry.*, 129 N. C. 154, 39 S. E. 808, 55 L. R. A. 418 (1901), *accord*. *Chicago, B. & Q. Ry. v. Lilley*, — Neb. —, 93 N. W. 1012 (1903), *contra*. "To adopt the doctrine of the so-called 'last clear chance' decisions, would be to require, not only of railway engineers, but of all other users of dangerous or ponderous machinery, the constant exertion of that extreme degree of vigilance and care, which ordinarily prudent men employ only in cases of extreme and unusual peril. To our minds such a requirement would be impracticable and unjust. See *Bour-*

⁶¹ Note in 55 L. R. A., pp. 418-

a position of danger, and yet is not guilty of contributory negligence with respect to an injury which befalls him. A person drives an unsafe horse near a train of cars;⁶³ or becomes a railroad passenger, while intoxicated;⁶⁴ or takes a place on a scaffold,⁶⁵ or in a car,⁶⁶ or elsewhere⁶⁷ which he is notified is dangerous, and is injured through the defendant's negligence. If at the time the mischief is done, the defendant was under a duty of care towards the plaintiff, notwithstanding the latter's misconduct; and, had he discharged that duty, no injury would have befallen the plaintiff, then it is clear that the proximate cause of the injury was defendant's negligence. Any precedent fault, on the part of the plaintiff, was at most a cause of the danger, not a cause of the harm.⁶⁸

rett v. Chic. & N. W. Ry., 152 Ia. 579, 132 N. W. 973, 36 L. R. A. N. S. 957 (1911), 10 Mich. Law Rev. 245; *Acton v. Fargo & M. Ry.*, 20 N. Dak. 434, 125 N. W. 225 (1910).

63. *Nashua Iron Co. v. Worcester, etc., Ry.* 62 N. H. 159 (1882). "If due care on the part of either at the time of the injury would prevent it, the antecedent negligence of one or both parties is immaterial, except it may be as one of the circumstances by which the requisite measure of care is to be determined. In such a case, the law deals with their behavior in the situation in which it finds them, at the time the mischief is done, regardless of their prior misconduct. The latter * * * is the cause of the danger; the former is the cause of the injury."

64. *Wheeler v. Grand Trunk Ry.*, 70 N. H. 607, 50 At. 103 (1901). In *Smith v. Norfolk, etc., Ry.*, 114 N. C. 728, 19 S. E. 863, 25 L. R. A. 287 (1894), the plaintiff's intestate had fallen on the defendant's track while intoxicated, but defendant could not avoid the accident after discovering him; *Bageard v. Consol. T. Co.*, 64 N. J. L. 316, 45 At. 620, 49 L. R. A. 424, 81 Am. St. R. 498 (1900).

65. *Smithwick v. Hall*, 59 Conn. 261, 21 At. 924, 12 L. R. A. 279, 21 Am. St. R. 104 (1890). Plaintiff was warned not to stand at a particular place on a scaffold, because it had no railing there. He was knocked from that point by the falling of a wall, due to defendant's negligence. His conduct was held not a cause of his injury, but a condition. "If he had not changed his position, he might not have been hurt. And so, too, if he had never been born, or had remained at home, on the day of the injury."

66. *Ky. Cen. Ry. v. Thomas*, 79 Ky. 160, 164, 42 Am. R. 208 (1880); *Dunn v. Grand Tr. Ry.*, 58 Me. 187, 4 Am. R. 267 (1870); *Jones v. Chicago, etc., Ry.*, 43 Minn. 279, 45 N. W. 444 (1890); *N. Y., etc., Ry. v. Ball*, 53 N. J. L. 283, 21 At. 1052 (1893); *Webster v. Rome, etc., Ry.*, 115 N. Y. 112, 21 N. E. 725 (1889).

67. *Fickett v. Lisbon Falls Co.*, 91 Me. 268, 39 At. 996 (1898); *Gray v. Scott*, 66 Pa. 345, 5 Am. R. 371 (1870); *Thomas v. San Pedro, L. A. & S. L. Ry.*, 170 Fed. 129 (1909), with full review of authorities.

68. In *Fla. So. Ry. v. Hirst*, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631 (1892), it was held, however, that it is con-

At times, it is very easy to apply this doctrine, and courts are able in such cases to declare that there was,⁷⁰ or was not,⁷¹ contributory negligence on the plaintiff's part. At other times the members of the court will draw such diverse inferences from the same evidence, as to lead to their disagreement, not only about the plaintiff's contributory negligence, but about the propriety of sending that question to a jury.⁷¹

530. Careless Conduct Induced by Defendant. When a person's safety is imperiled by the negligence of another, and he is forced to act upon the spur of the moment, without time for reflection or the exercise of cool judgment, all that is required of him is, that he shall act with reasonable prudence under the conditions and circumstances, as they appear to him at the moment. If he so acts, "his conduct is recognized by the law as a consequence of the defendant's mismanagement, for which the latter is responsible."⁷² Even though the plaintiff's conduct is of such a character as to be clearly negligent, but for the choice of risks unjustifiably put upon him by the defendant, and though that conduct be the proximate cause of his harm, it is not chargeable to him as contributory negligence.⁷³

tributory negligence for a passenger (1899); *Martin v. W. U. Ry.*, 23 Wis. to ride in an express car, in violation 437, 99 Am. Dec. 189 (1868); of a known rule of the company. *Mather v. Rillston*, 156 U. S. 391, 16

69. *Davis v. Cal., etc., Ry.*, 105 Cal. Sup. Ct. 464, 39 L. Ed. 414 (1895).
131, 38 Pac. 647 (1894); *Balt. Consol. Ry. v. Foreman*, 94 Md. 226, 51 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125 (1902); *Mearns v. Cen. Ry. N. J.*, 163 N. Y. 108, 57 N. E. 292 (1900); *Houston, etc., Ry. v. Clemmons*, 55 Tex. 88, 40 Am. R. 799 (1881); *Gahagan v. Bos. & M. Ry.*, 70 N. H. 441, 50 At. 146, 55 L. R. A. 426 (1900); *Sewell v. N. Y., etc., Ry.*, 171 Mass. 302, 50 N. E. 541 (1898); *Seyfer v. Otoe County*, 66 Neb. 566, 92 N. W. 756 (1902); *Gilbert v. Erie Ry.*, 97 Fed. 747 (1899); *Leighton v. Wheeler*, 106 Me. 450, 76 At. 916 (1910).

71. *Rider v. Syracuse, etc., Ry.*, 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125 (1902); *Hord v. Southern Ry.*, 129 N. C. 305, 40 S. E. 69 (1901). Held a question for the jury in *Elliot v. N. Y., N. H. & H. Ry.*, 83 Conn. 320, 76 At. 298 (1910); *Louisville Ry. Co. v. Mitchell*, 138 Ky. 190, 127 S. W. 770 (1910).

72. *Gannon v. N. Y., etc., Ry.*, 173 Mass. 40, 52 N. E. 1075, 43 L. R. A. 833 (1899); *Mobus v. Town of Waitsfield*, 75 Vt. 122, 53 At. 775 (1902).

73. *L. Wolff Mfg. Co. v. Wilson*, 152 Ill. 9, 38 N. E. 694, 26 L. R. A. 229 (1892); *Sears v. Dennis*, 105 Mass. 310 (1870); *Ellick v. Wilson*,

70. *Internat'l, etc., Ry. v. Williams*, 20 Tex. Civ. App. 587, 50 S. W. 732

531. The same rule is applied, when the defendant's misconduct has imperiled the lives of others than the plaintiff. "The law has so high regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness, in the judgment of prudent persons."⁷⁴ And when the danger is imminent, a deliberate balancing of chances is not to be expected. "The attendant circumstances must be regarded; the alarm, the excitement and confusion usually present on such occasions; the uncertainty as to the proper move to be made; the promptness required, and the liability to mistake as to what is best to be done, suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies."⁷⁵ The Supreme Court of Nebraska,⁷⁶ referring to the attempt of a servant, in charge of a hand-car, to remove it from the railroad track and thus obviate a possible train wreck, costing many lives, said: "Such conduct was not negligence, but heroism." And the New York Court of Appeals,⁷⁷ dealing with a case where the father had plunged into a canal to save his child who had fallen through a defective bridge, declared: "It would have been in contradiction of the most common facts in human experience, if the father had not plunged into the canal to save his child."

58 Neb. 584, 79 N. W. 152 (1899); 560, 52 Am. R. 594 (1884); Corbin Chic., etc., Ry. v. Winfrey, 67 Neb. 13, v. Philadelphia, 195 Pa. 461, 45 At. 93 N. W. 526 (1903); Coulter v. Am., 1070, 49 L. R. A. 715, 78 Am. St. R. etc., Co., 56 N. Y. 585 (1874). Jones 825 (1900); Cottrill v. Chic., etc., v. Boyce, 1 Stark. 493, 18 R. R. 812 Ry., 47 Wis. 634, 32 Am. R. 796 (1816). (1879).

74. Eckert v. Long Is. Ry., 43 N. Y. 502, 3 Am. R. 731 (1871).

76. Omaha, etc., Ry. v. Krayenbuhl, 48 Neb. 553, 67 N. W. 447 (1896).

75. Penn. Co. v. Langendorf, 48 O. St. 316, 28 N. E. 172, 13 L. R. A. 190, 29 Am. St. R. 553 (1891). Accord. Cen. Ry. v. Crosby, 74 Ga. 737, 58 Am. R. 463 (1885); Penn. Co. v. Roney, 89 Ind. 453, 46 Am. R. 173 (1883); Peyton v. Tex., etc., Ry., 41 La. Ann. 861, 6 So. 690 (1889); Md. Steel Co. v. Marney, 88 Md. 482, 42 At. 60, 71 Am. St. R. 441, 42 L. R. A. 842 (1898); Linnehan v. Sampson, 126 Mass. 506, 30 Am. R. 692 (1879); Donahoe v. Wabash, etc., Ry., 83 Mo.

77. Gibney v. State, 137 N. Y. 1, 33 N. E. 142, 33 Am. St. R. 690, 19 L. R. A. 365 (1893). The court added, "But while the immediate cause of the peril to which the father exposed himself was the peril of the child, for the purpose of administering legal remedies, the cause of the peril in both cases may be attributed to the culpable negligence of the State, in leaving the bridge in a dangerous condition."

532. Attempts to save property, are not encouraged by the courts, when they subject the rescuer to grave personal danger.⁷⁸ And where the defendant has not been guilty of actionable negligence, plaintiff acquires no right of suit against him, by sacrificing himself for the benefit of a third person.⁷⁹

533. Forgetfulness of Danger. The fact, that one has known that a particular source of danger exists, is admissible against him as evidence of contributory negligence, in case he voluntarily subjects himself to the danger and incurs harm therefrom. Such evidence, however, does not show conclusively that he has been guilty of contributory negligence. If the source of danger is a defect in the highway, the traveler is entitled to presume that it has been repaired. Even if he knows that it still exists, he is not bound to keep his thoughts fixed at all times on such defect. Momentary forgetfulness does not necessarily establish contributory negligence,⁸⁰ although there is now and then a case which seems to hold that it does.⁸¹

534. Assumption of Risk. The distinction, between this defense and that of contributory negligence, has been pointed out in

78. *Cook v. Johnson*, 58 Mich. 437, Ind. 102 (1861), defendant was 25 N. W. 388, 55 Am. R. 703 (1885); guilty of no negligence whatever; *McGill v. Me., etc., Co.*, 70 N. H. 125, *Kelley v. Boston*, 180 Mass. 233, 62 46 At. 684 (1900); *Morris v. R. R.* N. E. 259 (1902), the Massachusetts Co., 148 N. Y. 182, 186, 42 N. E. 579 statute imposes liability upon cities, (1898); *Chattanooga Light Co. v. Hodges*, 109 Tenn. 331, 70 S. W. 616 for defective highways, in favor only (1902); *Seale v. Gulf, etc., Ry.*, 65 of travelers, and plaintiff was not a Tex. 274, 57 Am. R. 602 (1886). Cf. traveler, when she descended into an open catch-basin, to rescue her child. *Berg v. Great Nor. Ry.*, 70 Minn. 272, 80. *Kelly v. Blackstone*, 147 Mass. 73 N. W. 648, 68 Am. St. R. 524 448, 18 N. E. 217, 9 Am. St. R. 730 (1897); *Liming v. Ill., etc., Ry.*, 81 (1888); *Maloy v. City of St. Paul*, Ia. 246, 47 N. W. 66 (1890); *Pull- 54 Minn. 398, 56 N. W. 94 (1893);* man Car Co. v. Leack, 143 Ill. 242, Weed v. Ballston Spa, 76 N. Y. 329 32 N. E. 285, 18 L. R. A. 215 (1892); (1879); *Knoxville v. Cox*, 103 Tenn. Wasmer v. D., L. & W. Ry., 80 N. Y. 368, 53 S. W. 734 (1899); *McQuillan v. City of Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. R. 799 (1895); *Simonds v. Baraboo*, 93 Wis. 40, 67 N. W. 40, 57 Am. St. R. 895 (1896).

81. *Davis v. Cal., etc., Ry.*, 105 Cal.

79. *Evansville, etc., Ry. v. Hiatt*, 17 131, 38 Pac. 647 (1894).

a former connection.^{81a} That distinction has not always been observed by the courts, and not a few tribunals, as we saw, have deliberately ignored or repudiated it. Two Minnesota cases,⁸² reported in the same volume, will illustrate the distinction. In the earlier of these cases, the plaintiff, with full and present knowledge of the defective condition of a sidewalk, and of the risks incident to its use, voluntarily attempted to walk upon it, when she could have gone around the defective part easily. The court held that she took her chances of injury—she voluntarily assumed a known risk—and injury having ensued, she had only herself to blame.⁸³

In the latter case, the defect (a hole in the sidewalk) was temporarily concealed by a light snow, and the plaintiff testified that she was not thinking of the defect when she stepped into it and fell. The court held that the case presented a question for the jury, whether the plaintiff's inattention to the known defect amounted to contributory negligence on her part.⁸⁴

81a. *Supra*, Chap. IV, § 4. See 292, 45 At. 638 (1900); *Langlois v. Schlemmer v. Buffalo, etc., Ry.*, 205 U. S. 1, 27 Sup. Ct. 407 (1907); and same case, 220 U. S. 590, 31 Sup. Ct. 561 (1911).

82. *Wright v. City of St. Cloud*, 54 Minn. 94, 55 N. W. 819 (1893); *Maloy v. City of St. Paul*, 54 Minn. 398, 56 N. W. 94 (1893). In *Burns v. Bos. El. Ry.*, 183 Mass. 96, 66 N. E. 418 (1903), it was held that a passenger, who rode on the front platform, knowing that there was a sign on the car, that "passengers riding on the front platform do so at their own risk," accepted the risk. There was no evidence that the rule had been waived by the company, as in *Sweetland v. Lynn & B. Ry.*, 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783 (1901). Risk was assumed in *McGorty v. Southern, etc., Co.*, 69 Conn. 635, 38 At. 359, 61 Am. St. R. 62 (1897); *Lamson v. Am. Ax. & T. Co.*, 177 Mass. 144, 58 N. E. 585 (1900); *Phelps v. Chic., etc., Ry.*, 122 Mich. 171, 81 N. W. 101 (1899); *Dillenberger v. Weingartner*, 64 N. J. L. 292, 45 At. 638 (1900); *Dunn Worsted Mills*, 25 R. I. 645, 57 At. 910 (1904); *Norfolk, etc., Ry. v. Marpole*, 97 Va. 594, 34 S. E. 462 (1899).

83. Cf. *Jones v. Canal, etc., Co.*, 109 La. 213, 33 So. 200 (1902); *Cattano v. Met. Ry.*, 173 N. Y. 565, 66 N. E. 563 (1903). The majority opinion proceeds upon the theory that plaintiff did not take the risk; *Cincinnati, etc., Ry. v. Lohe*, 68 Oh. St. 101, 67 N. E. 161 (1903); *Smith v. City of New Castle*, 178 Pa. 298, 35 At. 973 (1896), plaintiff, it was held, did not take the risk, reversing decision of trial court; *Phillips v. Ritchie Co.*, 31 W. Va. 477, 7 S. E. 427 (1888); *Borrmann v. City of Milwaukee*, 93 Wis. 522, 67 N. W. 924 (1896); *Reed v. Stockmeyer*, 74 Fed. 186, 20 C. C. A. 381, 34 U. S. App. 727 (1896).

84. Cf. *Moshenvel v. Dist. Columbia*, 191 U. S. 247, 24 Sup. Ct. 57 (1903); *Van Duzen Gas Co. v. Schellies*, 61 O. St. 298, 55 N. E. 998 (1899).

535. Comparative Negligence. It is well settled that where both the plaintiff and defendant are equally guilty of a mere want of ordinary care, the plaintiff cannot recover.⁸⁵ The negligence in such cases is often spoken of as concurrent. Where the negligence of the plaintiff, however, is small in comparison with that of the defendant, although operating concurrently with it to produce the harm, courts have often remarked upon the harshness of the common law rule of contributory negligence, and some have substituted for it a doctrine known as that of comparative negligence. It has been stated as follows: "The degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight and that of the defendant gross, he shall not be deprived of his action."⁸⁶

The doctrine has been rejected in the State of its origin,⁸⁷ and probably does not obtain now in any jurisdiction.⁸⁸ It appears to have been the result of an unsuccessful attempt to state the doctrine of decisive or proximate negligence, already discussed.⁸⁹

Since the publication of the first edition, some jurisdictions have enacted statutes adopting the comparative negligence rule.^{89a}

536. Young Children and Other Incapables. A minor may be

85. *Little v. Superior, etc., Ry.*, 35 L. Ed. 270 (1891), it is said: 88 Wis. 402, 60 N. W. 705 (1894). "The jury might well be of the

86. *Galena, etc., Ry. v. Jacobs*, 20 Ill. 478 (1858); *Chicago v. Stearns*, 105 Ill. 554 (1883). opinion that while there was some negligence on his part, in standing where and as he did, yet, that the

87. *City of Lanark v. Dougherty*, 153 Ill. 163, 166, 38 N. E. 892 (1894). officers of the boat knew just where and how he stood, and might have

88. It was adopted in *Union Pac. Ry. v. Rollins*, 5 Ks. 167 (1869), but repudiated in *Atchison, etc., Ry. v. Henry*, 57 Ks. 154, 45 Pac. 576 (1896). Possibly it obtains in Nebraska, *Village of Orleans v. Perry*, 24 Neb. 831, 836, 40 N. W. 417 (1888). In a few States, a similar doctrine has been enunciated in statutes. See *Fla. So. Ry. v. Hirst*, 30 Fla. 1, 11 So. 506, 32 Am. St. R. 17, 16 L. R. A. 631 (1892); Ala., etc., *Ry. v. Coggins*, 88 Fed. 455 (1898). avoided injuring him, if they had used reasonable care to prevent the steamboat from striking the wharf, with unusual and unnecessary violence. If such were the facts, the defendant's negligence was the proximate, direct, and efficient cause of the injury."

89a. *Thornton's Federal Employers' Liability and Safety Appliance Acts*, especially at p. 412; *Dohr v. Wisconsin C. Ry.*, 144 Wis. 545, 129 N. W. 252 (1911); 9 Mich. Law Rev. 244.

89. In *Inland, etc., Co. v. Tolson*, 139 U. S. 551, 559, 11 Sup. Ct. 653,

guilty of contributory negligence, whenever it is shown that he is capable of taking ordinary care of himself in the situation in question. Whether he has such capacity is a question of fact, although the undisputed evidence in a particular case may show to the satisfaction of the court, either that he was,⁹⁰ or that he was not,⁹¹ capable of contributory negligence. Generally speaking, "the standard of responsibility is the average capacity of others of the same age and experience, and to this standard a child should be held, in the absence of evidence on the subject."⁹²

One, who is so devoid of intelligence, as to be unable to apprehend apparent danger, and to avoid exposure to it, cannot be guilty of contributory negligence; because he is incapable of exercising care. Still, other persons are not bound to observe special precautions for the safety of such an incapable, unless they have notice of his incapacity, or mental deficiency.⁹³ When the incapacity comes from voluntary intoxication, it is no excuse for contributory negligence;⁹⁴ although, if the defendant knew of the intoxication, and could have avoided harming the plaintiff, by the exercise of due care, his failure to exercise such care will constitute decisive negligence, and be the proximate cause of the harm.⁹⁵

90. *Killelea v. Cal. H. Co.*, 140 Cal. 602, 74 Pac. 157 (1903); *Evans v. Josephine Mills*, 119 Ga. 448, 46 S. E. 674 (1904); *Shelley v. City of Austin*, 74 Tex. 608, 12 S. W. 753 (1889).

91. *Carney v. Concord St. Ry.*, 72 N. H. 364, 57 At. 218 (1903); *O'Brien v. Wis. C. Ry.*, 119 Wis. 7, 96 N. W. 424 (1903); *Kunz v. City of Troy*, 104 N. Y. 344, 10 N. E. 442, 58 Am. R. 508 (1887).

92. *Parker v. St. Ry.*, 207 Pa. 438, 441, 56 At. 1001 (1903); *Lafferty v. Third Ave. Ry.*, 85 App. Div. 592, 598, 83 N. Y. Supp. 405, 176 N. Y. 594 (1903); *Stone v. Dry Dock, etc., Ry.*, 115 N. Y. 107, 21 N. E. 712 (1889); *Cleveland Rolling M. Co. v. Corrigan*, 46 O. St. 283, 20 N. E.

466, 3 L. R. A. 385 (1889); *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67 (1850); *Kucera v. Merrill L. Co.*, 91 Wis. 637, 65 N. W. 374 (1895).

93. *Worthington v. Mencer*, 96 Al. 310, 11 So. 72, 17 L. R. A. 407 (1892).

94. *Johnson v. Louisville, etc., Ry.*, 104 Al. 241, 16 So. 75, 53 Am. St. R. 39 (1893); *Burke v. Chic., etc., Ry.*, 108 Ill. App. 565 (1903); *Meyer v. Pac. Ry.*, 40 Mo. 151 (1867); *Bageard v. Consol. Tr. Co.*, 64 N. J. L. 316, 45 At. 620, 49 L. R. A. 424, 81 Am. St. R. 498 (1900); *Smith v. Norfolk, etc., Ry.*, 114 N. C. 728, 19 S. E. 863, 25 L. R. A. 287 (1894).

95. *Edgerly v. Union St. Ry.*, 67 N. H. 312, 36 At. 558 (1892).

§ 4. IMPUTED NEGLIGENCE.

537. Master and Servant. We have seen, in an earlier chapter, that the negligence of the servant, using that term in its generic sense, is imputable to the master, when the latter is a defendant. It is likewise imputable to him when he is a plaintiff, provided, as in the former case, that the negligence of the servant is within the apparent scope of his authority.⁹⁶ Accordingly, a person who sues for the value of his slave, killed by defendant's negligence, may be defeated by evidence of contributory negligence on the slave's part.⁹⁷

Moreover, a husband who sues for damages for the loss of the society and services of his wife, as well as for the medical expenses, due to injuries caused by the defendant's negligence, is subject to the defense of contributory negligence by the wife.⁹⁸ Whether an action by the wife for personal injuries is subject to the defense of contributory negligence on the husband's part, depends upon the question whether he was acting as her representative at the time; at least, in jurisdictions where she is entitled to sue alone, and is also entitled to the recovery.⁹⁹ If the husband must join as a plaintiff, and especially if the recovery belongs to him, his contributory negligence will bar a recovery.¹⁰⁰

538. Carrier and Passenger. There is some authority for the proposition that a passenger is so far identified with the carrier, that the negligence of the latter, or of his servants, is to be imputed to the passenger; although neither the carrier nor his employees sustain the relation of servants to the passenger, but are independent contractors.¹ This doctrine has been repudiated, how-

⁹⁶ *St. Louis, etc., Ry. v. Hecht*, 38 Ark. 357 (1882); *Winner v. Oakland*, 158 Pa. 405, 27 At. 1110 (1893).

Ry. v. Stommel, 126 Ind. 35, 25 N. E. 863 (1890); *La Riviere v. Pemberton*, 46 Minn. 5, 48 N. W. 406 (1891); *Puterbaugh v. Reasor*, 9 O. St. 844 (1859).

⁹⁷ *Sims v. Macon, etc., Ry.*, 28 Ga. 93 (1859).

⁹⁸ *Chicago, etc., Ry. v. Honey*, 63 Fed. 39, 12 C. C. A. 190, 27 U. S. App. 196, 26 L. R. A. 42 (1894);

⁹⁹ *Davis v. Guarnieri*, 45 O. St. 470, 15 N. E. 350, 4 Am. St. R. 548 (1887); *Bailey v. City of Centerville*, 115 Ia. 271, 88 N. W. 379 (1901).

¹⁰⁰ *Penn. Ry. v. Goodenough*, 55 N. J. L. 577, 28 At. 3, 22 L. R. A. 460 (1893).

¹ *Thorogood v. Bryan*, 8 C. B. 115, 18 L. J. C. B. 336 (1849);

ever, in most of the jurisdictions, which once enforced it, and never found much favor in this country.² A learned English judge, referring to the reasoning in *Thorogood v. Bryan*, said:³ "I do not think it well grounded either in law or in fact. What kind of control has the passenger over the driver (*cf.* an omnibus or street car) which would make it reasonable to hold the former affected by the negligence of the latter?—And when it is attempted to apply this reasoning to passengers travelling in steamships or on railways, the unreasonableness of such a doctrine is even more glaring."

539. **Parent and Child.** Whether the negligence of the parent, or of one *in loco parentis*, should be imputed to a child who is incapable of exercising care on his behalf, is a question upon which the courts of this country are divided. The argument in favor of imputing the parent's contributory negligence to the child, as stated in the leading case on this topic is as follows: The law enjoins the duty of mutual care upon persons, who are in the highway or in

Payne v. Chic., etc., Ry., 39 Ia. 523 (1874); *Lockhart v. Lichtenthaler*, 46 Pa. 151 (1863); *Carlisle v. Sheldon*, 38 Vt. 440, 447 (1886). In *Cuddy v. Horn*, 46 Mich. 596, 41 Am. R. 178 (1881), and *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. R. 558 (1878), the doctrine is laid down that a passenger in a private conveyance is identified with the driver, because if the latter does not obey the former's directions, the passenger can refuse to commit his safety any longer to the driver's care.

2. *The Bernina*, 12 Prob. Div. 58, 56 L. J. P. D. & A. 17 (1887), *aff'd sub nom. Mills v. Armstrong*, 13 App. Cas. 1, 57 L. J. P. D. & A. 65 (1888); *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652 (1886); *Mo. Pac. Ry. v. Tex. Pac. Ry.*, 41 Fed. 316 (1890); *Little, etc., Ry. v. Harrell*, 58 Ark. 454, 25 S. W. 117 (1894); *Larkin v. Burlington, etc., Ry.*, 85 Ia. 492, 52 N. W. 480 (1892); *Pittsburg, etc., Ry. v. Spencer*, 98 Ind. 186 (1884); *Danville, etc., Turnpike Co. v. Stewart*, 2 Met. (Ky.) 119 (1859); *Holzab v. New Orleans, etc., Co.*, 38 La. Ann. 185, 58 Am. R. 177 (1886); *Randolph v. O'Riordon*, 155 Mass. 331, 29 N. E. 583 (1892); *Cuddy v. Horn*, 46 Mich. 596, 41 Am. R. 178 (1881); *Flaherty v. Minn., etc., Ry.*, 39 Minn. 328, 40 N. W. 160, 12 Am. St. R. 654, 1 L. R. A. 680 (1888); *Poplitz v. City of St. Paul*, 86 Minn. 373, 90 N. W. 794 (1902); *Becke v. Mo. Pac. Ry.*, 102 Mo. 544, 13 S. W. 1053, 9 L. R. A. 157 (1890); *N Y., etc., Ry. v. Steinbrenner*, 47 N. J. L. 161, 54 Am. R. 126 (1885); *Chapman v. New Haven Ry.*, 19 N. Y. 341, 75 Am. Dec. 344 (1859); *Dean v. Penn. Ry.*, 129 Pa. 514, 18 At. 718 (1889); *Covington Tr. Co. v. Kelly*, 36 O. St. 86 (1880); *Makham v. Houston, etc., Co.*, 73 Tex. 247, 11 S. W. 131 (1889).

3. Lord Herschell in *Mills v. Armstrong*, 13 App. Cas. at p. 8.

similar positions, where the presence of either limits to some extent the freedom of action of the other. Small children are not exempt from this rule when they bring actions for redress of injuries, and the only way to enforce the rule is to require due care from those to whom the law and the necessity of the case have delegated the exercise of that discretion, which the small child does not possess. Such a child, it is said, is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and in respect of third persons, his act must be deemed that of the infant; his neglect, the infant's neglect. When the infant complains of wrongs to himself, the defendant has a right to insist that he should not have been the heedless instrument of his own injury. If his proper agent and guardian has suffered him to incur mischief, it is much more fair that he should look for redress to that guardian, than that the latter should negligently allow his ward to be in the way of travellers, or like persons, and then harrass them in courts of justice, recovering heavy verdicts for his own misconduct.⁴

540. This argument has been deemed unsound by the majority of our courts which have dealt with this question. It is admitted that the law puts the infant under the care of an adult, but how, it is asked, can this right to be cared for and protected be construed into an obligation to waive or forfeit any of the infant's legal rights? If the parent or guardian were to contract with the defendant, that the latter should not be liable to the infant for any harm inflicted upon him by the joint negligence of the parent and defendant, such engagement, it is declared, would be invalid, both because it would be against good morals, and, also, beyond the legal authority of the parent. Moreover, if the parent's negligence is imputable to the infant, so as to defeat an action for injuries sustained by him, it is equally imputable, for the purpose of

4. *Hartfield v. Roper*, 21 Wend. 615 (1839); followed in *Daly v. Hintz*, 113 Cal. 366, 45 Pac. 693 (1896); *Atch., etc., Ry. v. Calvert*, 52 Ks. 547, 552, 34 Pac. 976 (1893); *Baltimore, etc., Ry. v. McDonnell*, 43 Md. 534, 551 (1875); *Holly v. Bos. Gaslight Co.*, 8 Gray (74 Mass.) 123, 69 Am. Dec. 233 (1857); *Fitzgerald v. St. Paul, etc., Ry.*, 29 Minn. 336, 13 N. W. 168, 43 Am. R. 212 (1882); *Decker v. McLeslie*, 62 Me. 468 (1873); *Sorley*, 111 Wis. 91, 86 N. W. 554 (1901); *D. L. & W. Ry. v. Devore*, 114 Fed. 155, 52 C. C. A. 77 (1902).

subjecting him to actions for the harmful consequences to third persons from such negligence; a conclusion for which there is no shadow of legal authority. And, finally, it is said, the conversion of the infant, who is entirely free from fault, into a wrongdoer by imputation, it is logical contrivance uncongenial with the spirit of jurisprudence; while there is no injustice, no hardship in requiring all wrongdoers to be answerable to a person, who is incapable either of self-protection, or of being a participant in their misfeasance.⁵

Of course, when the parent sues, in his own right, for the loss of the child's services, or for expenditures rendered necessary by the child's injuries, his own negligence in caring for and guarding the child is a valid defense.⁶

§ 4a. NEGLIGENCE OF THIRD PARTIES.

541. Ordinarily, a person cannot be compelled to pay for the negligence of another, unless that other acts as his representative or joins him with his consent in inflicting the injury. At times, however, the negligence of one person unites with the independent

5. *Newman v. Phillipsburg, etc.*, 716 (1884); *Warren v. Manchester Co.*, 52 N. J. L. 446, 19 At. 1102, 8 L. R. A. 842 (1890). *Accord*, *Govt. St. Ry. v. Hanlon*, 53 Al. 70 (1875); *St. Louis, etc., Ry. v. Rexroad*, 59 Ark. 180, 26 S. W. 1037 (1894); *Daley v. Norwich, etc., Ry.*, 26 Conn. 591, 68 Am. Dec. 413 (1858); *Chic. City Ry. v. Wilcox*, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76 (1889); *City of Evansville v. Senhenn*, 151 Ind. 42, 47 N. E. 634, 68 Am. St. R. 218, 41 L. R. A. 728 (1897), overruling *Pittsburg, etc., Ry. v. Vining*, 27 Ind. 513, 92 Am. Dec. 269 (1867); *Westerfield v. Levis*, 43 La. Ann. 63, 9 So. 52 (1891); *Westbrook v. Mobile, etc., Ry.*, 66 Miss. 560, 6 So. 321, 14 Am. St. R. 587 (1889); *Winters v. Kan. City Ry.*, 99 Mo. 509, 12 S. W. 652, 6 L. R. A. 536, 17 Am. St. R. 591 (1889); *Huff v. Ames*, 16 Neb. 139, 19 N. W. 623, 49 Am. R. 716 (1884); *Warren v. Manchester St. Ry.*, 70 N. H. 352, 47 At. 735, with full collection of authorities (1900); *Bottoms v. Seaboard, etc., Ry.*, 114 N. C. 699, 19 S. E. 730, 25 L. R. A. 784, 41 Am. St. R. 799 (1894); *Bellefontaine, etc., Ry. v. Snyder*, 18 O. St. 399, 98 Am. Dec. 175 (1868); *Galveston, etc., Ry. v. Moore*, 59 Tex. 64, 46 Am. R. 265 (1883); *Dicken v. Liverpool, etc., Co.*, 41 W. Va. 511, 23 S. E. 582 (1895); *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67 (1850); *Chicago, etc., Ry. v. Kowalski*, 92 Fed. 310, 34 C. C. A. 1, with note classifying decisions (1899).

6. *Bellefontaine, etc., Ry. v. Snyder*, 24 O. St. 670 (1874); *Erie City Ry. v. Schuster*, 113 Pa. 412, 6 At. 269, 57 Am. R. 471 (1886); *Williams v. Tex., etc., Ry.*, 60 Tex. 205 (1883).

negligence of an unassociated third party to produce a single injury to plaintiff. What are the latter's rights, in such a case, against the independent but concurrent wrongdoers? ^{6a}

541a. Some courts have declined to venture upon a general answer to this question, insisting that each case must be decided upon its special facts.^{6b} The majority view, however, may be stated as follows: "When two concurring causes produce an injury, which would not have resulted in the absence of either, the party responsible for either cause is liable for the entire consequent injury; and this rule applies when one of the causes is the act of God."^{6c}

§ 5. LIABILITY OF LANDOWNER OR OCCUPIER; AND OF OTHERS ENGAGED IN EXTRA HAZARDOUS UNDERTAKINGS.

542. **Doctrine of Rylands v. Fletcher.** In this leading English case, it was judicially declared,⁷ "That the true rule of law is that the person who for his own purposes brings on his lands, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril; and if he does not do so, is *prima facie* liable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God."⁸ * * * The general

6a. This question is dealt with to some extent in the chapter on Remedies, *supra*, § 233.

6b. *City of Louisville v. Hart's Admr.*, 143 Ky. 171, 136 S. W. 212 (1911). The negligence of the city in the care of its streets threw the deceased upon street car tracks, and the negligent management of the car caused his death. Recovery allowed against the city.

6c. *St. Louis Southwestern Ry. v. Mackey*, 95 Ark. 297, 129 S. W. 78 (1910); *Cleveland C. C. & St. L. Ry. v. Hilligoss*, 171 Ind. 417, 86 N. E. 485, 131 Am St. R. 258 (1908); *Harrison v. Kansas City Light Co.*, 195 Mo. 606, 93 S. W. 951, 7 L. R. A. N.

S. 293 (1906); *Allison v. Hobbs*, 96 Me. 26, 51 At. 245 (1901); *Walton, Witten & Graham v. Miller's Adm'r.*, 109 Va. 210, 63 S. W. 458, 132 Am. St. R. 908 (1909).

7. Blackburn, J., in *Fletcher v. Rylands*, L. R. 1 Ech. 265, 279-280, 35 L. J. Ex. 154 (1866), approved in *Rylands v. Fletcher*, L. R. 3 H. L. 330, 339-340, 37 L. J. Ex. 161 (1868), by Cairns, Ld. Ch., and Cranworth, L. J.; also in *Smith v. Giddy* (1904), 2 K. B. 448.

8. *Nichols v. Marsland*, L. R. 2 Ex. 1, 46 L. J. Ex. 174 (1876), so holds; and in *Box v. Jubb*, 4 Ex. D. 76, 48 L. J. Ex. 417 (1879), it was held that a reservoir owner is not

rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir,⁹ or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property, which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous, if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue; or, answer for the natural, and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth or stench.

This bold generalization of Mr. Justice Blackburn has been extravagantly praised¹⁰ and extravagantly censured.¹¹ Having been accepted by the House of Lords, it has fixed the rule for England; and yet, we are assured, "the tendency of later decisions has been rather to encourage the discovery of exceptions than otherwise. * * * No case has been found, not being closely similar in its facts, or within the same previously recognized category, in which

liable for the escape of water due to the act of a stranger, which defendant had no reason to anticipate.

9. In *Rylands v. Fletcher*, the plaintiff's harm came from water percolating through an ancient coal shaft, long filled up and not known to defendant or his agents, from a reservoir built by defendant on his land.

10. Professor Wigmore, in 7 Harv. Law Rev., pp. 454, 455, speaks of Mr. Justice Blackburn's generalization as "epochal in its consequences." He adds: "The practical effect of that great jurist's opinion has been to furnish us with three main categories of acts to which re-

sponsibility is affixed with reference to specific harm, viz. (1) acts done willfully with reference to that harm; (2) acts done at peril with reference to that harm; (3) acts done negligently with reference to that harm."

11. Mr. Bishop, in his *Non-Contract Law*, § 839, note 3, after quoting the passage given above, remarks: "It is needless to say that such is not the law in any common law country. . . . The reasoning so far as it proceeds on grounds, other than negligence, is the individual reasoning of the judges, and not the reasoning of the law."

the unqualified rule of liability without proof of negligence has been enforced.”¹²

543. Rylands v. Fletcher Not Generally Approved in America. While the decision has been cited frequently by our courts, few of them have given it unqualified approval, while many have emphatically rejected its doctrine. Perhaps the supreme judicial court of Massachusetts has given it countenance beyond most of our tribunals, but even in that jurisdiction, the rule is limited, apparently, to cases of trespass and nuisance.¹³ As thus limited, it is neither novel nor objectionable.¹⁴

In a recent Massachusetts case, the Rylands v. Fletcher rule, it is said, applies only “to unusual and extraordinary uses of one’s property which are so fraught with peril to others, that the owner should not be permitted to adopt them for his own purposes, without absolutely protecting his neighbors from injury or loss by reason of the use; * * * unless he provides safeguards whose perfection he guarantees.”¹⁵ Such a rule, it was declared, is not applicable to the construction and maintenance of the walls of an ordinary building near the land of an adjacent owner. “As it is desirable that buildings and fences should be put up, the law does not throw the risk of that act, any more than of other necessary conduct, upon the actor, or make every owner of a structure insure

12. Pollock, Torts (6th Ed.), 472, 473.

13. Fitzpatrick v. Welch, 174 Mass. 486, 55 N. E. 178, 48 L. R. A. 278 (1899), where defendant collected water on his roof and discharged it into a gutter, from which it necessarily flowed upon plaintiff’s land, unless diverted by defendant. Said Holmes, C. J.: “The danger is so manifest, so constant and so great as to impose upon defendant the duty of preventing, at his peril, harm from coming to pass.” He cited Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. R. 318 (1870), where defendant maintained a French roof, so near the street, as to cause snow and ice

to fall upon travellers; and Jutte v. Hughes, 67 N. Y. 267 (1876), where defendant’s drains and privies discharged water and filth upon plaintiff’s land.

14. Supra, Chaps. 11 and 14; also Berger v. Minn. Gaslight Co., 60 Minn. 296, 301, 62 N. W. 336 (1895); “It is only those things, the natural tendency of which is to become a nuisance, or to do mischief, if they escape, which the owner keeps at his peril;” thus limiting Cahill v. Eastman, 18 Minn. 324, 10 Am. R. 184 (1872), which followed Rylands v. Fletcher.

15. Ainsworth v. Lakin, 180 Mass. 397, 62 N. E. 746, 57 L. R. A. 132 (1902).

against all that may happen, however little to be foreseen.”¹⁶ The duty of a land owner, or occupier, in such case of lawful use, is to make the conditions safe, so far as it can be done by the exercise of ordinary care.

If, however, the walls of a building become ruinous and thus a nuisance to neighbors, or those lawfully near them, the owner is under the duty of not suffering the structure to remain, without using such care in the maintenance of it as will absolutely prevent injuries, except from such causes as *vis major*, acts of public enemies, or wrongful acts of third persons, which human foresight could not reasonably be expected to anticipate and prevent.”¹⁷

544. The New York Court of Appeals has refused to accept the rule laid down in *Rylands v. Fletcher*, declaring that it is in direct conflict with the law as settled in this country.¹⁸ Similar disapproval of the rule has been expressed by the courts of last resort in other States.¹⁹ In the New Jersey case, cited in the last note, it is said: “The fallacy in the process of argument by which judgment is reached, in the case of *Fletcher v. Rylands*, appears to consist in this: that the rule mainly applicable to a class of cases, which should be regarded as, in a great degree exceptional, is amplified into a general if not universal principle.” Let us consider these exceptional cases.

545. **Liability for Cattle and Nuisances.** We have seen in a former chapter²⁰ that a person acts at his peril in maintaining a nuisance; and, in another chapter,²¹ that the owner of trespassing cattle is answerable for all the harm done by them, whether he have notice of their disposition to do the particular harm or not. But we also saw, that the owner of cattle is not liable for harm done by them while driven along the highway without negligence on his part, and without notice of their viciousness; nor is he liable for mischief done by them to the person or personal property of

16. *Quinn v. Crimmings*, 171 Mass. 255, 50 N. E. 624, 42 L. R. A. 101, 68 Am. St. R. 420 (1898).
 17. *Ainsworth v. Lakin*, 180 Mass. 397, 62 N. E. 748, 57 L. R. A. 132 (1902); *Simmons v. Everson*, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. R. 677 (1891).
 18. *Losee v. Buchanan*, 51 N. Y. 476, 487, 10 Am. R. 623 (1873).
 19. *Brown v. Collins*, 53 N. H. 442, 16 Am. R. 372, and note (1873); *Marshall v. Wellwood*, 38 N. J. L. 339, 20 Am. R. 394 (1876).
 20. Chapter XIV.
 21. Chapter XI.

another, at other times, when the action is not one of trespass *quare clausum fregit*, without proof that he had notice of their viciousness, or that he was otherwise negligent.²²

Clearly it cannot be said that the common law imposed upon the owner of cattle the liability of an insurer against all damage done by them, if they escaped from his land.²³

546. Vicious Animals. When these are not useful for any lawful purpose, or are so kept, as to be a menace to human beings, while engaged in lawful pursuits, they are fairly classed as a nuisance. Hence they may be killed without incurring liability; and, if they do damage, their owner or responsible keeper must answer therefor.²⁴

When, however, the vicious animal, such as a watch-dog, may be lawfully kept for useful purposes, the liability of the owner or keeper is for negligence in the manner of keeping it.²⁵ He is, of course, bound to exercise a degree of care, commensurate with the danger to others which will follow the dog's escape from his custody, to so secure it that it will not injure anyone who does not unlawfully provoke or intermeddle with it, or invite an attack from it.²⁶

22. *Van Leuven v. Lyke*, 1 N. Y. 515, 516, 49 Am. Dec. 346 (1848); *Annapolis, etc., Ry. v. Baldwin*, 60 Md. 88, 45 Am. R. 711 (1882).

23. In Chapter XI, it was shown, that custom and legislation have modified the common law liability of cattle owners materially.

24. *Jones v. Carey*, 9 Houst. (Del.) 214, 31 At. 976 (1891); *Aldrich v. Wright*, 53 N. H. 398, 16 Am. R. 339 (1873); *Muller v. McKesson*, 73 N. Y. 195, 29 Am. R. 129 (1878).

25. *Knickerbocker Ice Co. v. Finn*, 80 Fed. 483 (1897); *Baldwin v. Ensign*, 49 Conn. 113, 44 Am. R. 205 (1881); *Hahnke v. Friederick*, 140 N. Y. 224, 35 N. E. 487 (1893); *Duval v. Barnaby*, 75 App. Div. 154, 77 N. Y. Supp. 337, 11 N. Y. Annotated Cas. 227 and note (1902); *Benoit v. Troy, etc., Ry.*, 154 N. Y.

223. 48 N. E. 524 (1897); *Hayes v. Smith*, 62 O. St. 161, 182, 56 N. E. 879 (1900); *Crowley v. Groonell*, 73 Vt. 45, 50 At. 546, 55 L. R. A. 876, 86 Am. St. R. 790 (1901), a big dog whose assault may have been playful, but was dangerous.

26. *DeGray v. Murray*, 69 N. J. L. 458, 55 At. 237 (1903); *Worthen v. Love*, 60 Vt. 285, 14 At. 461 (1888). In some States the liability of the owner or keeper of dogs has been made nearly absolute. See *Dillehay v. Hickey* (Ky.), 71 S. W. 1 (1902); *Carroll v. Marcoux*, 98 Me. 259, 56 At. 848 (1903); *Riley v. Harris*, 177 Mass. 163, 58 N. E. 584 (1900); *Jenkinson v. Coggins*, 123 Mich. 7, 81 N. W. 974 (1900); *Peck v. Williams*, 24 R. I. 583, 54 At. 381 (1903).

547. Care of Fire and Electricity. The common law held the person starting a fire, even for necessary and lawful purposes, to an absolute responsibility for its consequences. The doctrine of a carefully considered case, decided in 1400 A. D.,²⁷ is thus stated in Rolle's Abridgment: "If my fire by misfortune burns the goods of another man, he shall have an action against me. * * * If my servant put a candle or other fire in a place in my house and it falls and burns my house and the house of my neighbor, an action on the case lies against me."²⁸ The only defense available to the one, on whose premises a fire originated, was that the fire was due to the unauthorized act of a stranger, or of one for whose act defendant was not legally answerable.

This doctrine was modified by statute in 1707,²⁹ so as to exempt land owners from liability for accidental fires; but for the consequences of fire negligently or intentionally started for any purpose, the originator is absolutely liable still,³¹ save in cases where he has received statutory authority to maintain a fire, as in the case of railroad companies.³²

The same extraordinary liability rests upon one, who brings electricity upon his premises, whence it escapes to the harm of his neighbors.³³ "While the convenience of electric and telephone wires is obvious * * * a company should not be relieved, on the ground of expense, from the duty of exercising a reasonable degree of care to maintain proper insulation and thereby prevent accidents reasonably to be apprehended."^{33a}

In this country, the common law liability for fire has never been enforced. A person does not start a fire on his land at his peril. If it spreads beyond his premises and harms others, his liability for the harm must be grounded on his negligence. The

²⁷. *Beaulieu v. Finglam*, 2 H. IV., 18 pl. 6. Lyndhurst's understanding of the statutes.

²⁸. *Action Sur. Case*, Pur. Fewe, B. 1 and 3.

²⁹. *Allen v. Stephenson*, 1 Lutw. 90 (1700).

³⁰. Chap. 31, Sec. 6, of 6 Anne, superceded by 14 Geo. 3, Chap. 78, Sec. 86.

³¹. *Filliter v. Phippard*, 11 Q. B. 347, 17 L. J. Q. B. 89 (1847), rejecting Blackstone's and Lord

³². *Jones v. Festiniog Ry.*, L. R. 3 Q. B. 733, 37 L. J. Q. B. 214 (1868); *Powell v. Fall*, 5 Q. B. D. 697, 49 L. J. Q. B. 428 (1880).

³³. *Nat. Tel. Co. v. Baker* (1893), 2 Ch. 186, 62 L. J. Ch. 699.

^{33a}. *Braun v. Buffalo Gen. Elec. Co.*, 200 N. Y. 484, 94 N. E. 206 (1911).

same is true of his liability for electricity escaping from his control. In both cases, however, the care which he must exercise in guarding the dangerous element varies with the hazard to which it exposes others.³⁴ Some courts treat him as an insurer against its harm.^{34a}

In some States the liability for the consequences of fire is regulated by statute.³⁵

548. Liability for Explosives. This, under the doctrine of *Rylands v. Fletcher*, should be absolute, and such seems to be the holding in England.³⁶ In this country, the liability is absolute, only when the defendant's conduct amounts to the maintenance of a nuisance.³⁷ Otherwise, his liability is for negligence. If he is ignorant of the character of the explosive, and his ignorance is not due to fault on his part, his duty of care is fixed by the apparent character of the article.³⁸ Otherwise, he is bound to exercise a

34. *St. Louis, etc., Ry. v. Yonley*, 53 Ark. 503, 14 S. W. 800 (1890); *Burroughs v. Housatonic Ry.*, 15 Conn. 124, 38 Am. Dec. 64 (1842); *Hauch v. Hernandez*, 41 La. Ann. 992, 6 So. 783 (1889); *Batchelder v. Heagan*, 18 Me. 32 (1840); *Hewey v. Nourse*, 54 Me. 257 (1866); *Clark v. Foot*, 8 Johns. (N. Y.) 421 (1811). Liability for electricity, *Southern Bell Tel. Co. v. McTyler*, 137 Al. 601, 34 So. 1020 (1903); *Knowlton v. Des Moines, etc., Co.*, 117 Ia. 451, 90 N. W. 818 (1902); *Thomas v. Maysville Gas Co.*, 108 Ky. 224, 56 S. W. 154 (1900); *Gerrish v. Whitfield*, 72 N. H. 222, 55 At. 551 (1903); *Mitchell v. Raleigh Elec. Co.*, 129 N. C. 166, 39 S. E. 801 (1901); *Daltry v. Media Elec. Co.*, 208 Pa. 403, 57 At. 833 (1904); *Cumberland, etc., Co. v. United Elec. Ry.*, 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236 (1894); *Joyce*, *Electric Law*, Chap. 22.

34a. *Capital Gas Co. v. Davis*, 138 Ky. 628, 128 S. W. 1062 (1910), injured party was guilty of contributory negligence; *Booker v. South-*

west Mo. Ry., 144 Mo. App. 273, 128 S. W. 1012 (1910).

35. *Shearman & Redfield*, *Negligence* (5th Ed.), sec. 671, and authorities there cited.

36. *Clerk and Lindsell*, *Torts* (2d Ed.), 375.

37. *Heeg v. Licht*, 80 N. Y. 579, 36 Am. R. 654 (1880); and authorities cited in the chapter on Nuisance.

38. *The Nitro-Glycerine Case*, 15 Wall. (U. S.) 524, 21 L. Ed. 206 (1872). The third head note is as follows: "Where there is nothing to excite the suspicion of a common carrier as to the contents of a package, it is not negligence . . . to handle it in the same manner as other packages, of similar outward appearance, are handled." At p. 538, after referring to cases arising from fire, blasting and similar causes, the court says: "The rule deducible from them is, that the measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution

degree of care commensurate with the hazard to which his possession, use or sale of the explosive subjects others,³⁹ who are free from contributory fault.⁴⁰

549. Poisons and Other Dangerous Articles. Here, again, the liability, of the manufacturer, seller, lender or user is not that of an insurer of safety. He does not act at his peril in lawfully making, selling, lending, or using such articles. He does incur liability, however, even to persons with whom he has no contract relations, when he fails to exercise such care as is fairly necessary to the protection of others against the extraordinary hazard to which these articles subject them.⁴¹ Accordingly, if a drug dealer sells to a

would use, if his own interests were to be affected, and the whole risk were his own." In *Wells v. Gallagher*, 144 Ala. 363, 39 So. 747, 3 L. R. A. N. S. 759 (1905), it is held that one who leaves a bomb in a public highway, is liable for injuries to a boy who picks it up, carries it to an adjacent yard and explodes it. But see *Jacobs v. N. Y., N. H. & H. Ry.*, 212 Mass. 96, 98 N. E. 688, 40 L. R. A. N. S. 41 (1912).

^{39.} *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682 (1868); *Wellington v. Downer Ker. Oil Co.*, 104 Mass. 64 (1870); *Weiser v. Holzman*, 33 Wash. 87, 73 Pac. 797 (1903). In the last cited case, plaintiff alleged "negligence in the manufacture and bottling of a dangerous explosive, called champagne cider;" and the complaint was held upon demurrer to state a good cause of action. *Torgesen v. Schultz*, 192 N. Y. 156, 84 N. E. 956, 18 L. R. A. N. S. 726 (1908), siphon bottle of aerated water; *O'Neill v. James*, 138 Mich. 567, 101 N. W. 828, 68 L. R. A. 342, 110 Am. St. R. 321 (1904), bottle of champagne cider, defendant's negligence for the jury upon the evidence. In *Walker v. Chic., etc., Ry.*, 71 Ia. 658, 33 N. W. 224 (1887), plaintiff failed, because she did not give evidence of negligence on defend-

ant's part. See *Binford v. Johnson*, 82 Ind. 426, 48 Am. R. 508 (1882); *Waters-Pierce Oil Co. v. Davis*, 24 Tex. Civ. App. 508, 60 S. W. 453 (1900); *Smith v. Clark Hardware Co.*, 100 Ga. 163, 28 S. E. 73, 39 L. R. A. 607 (1897).

^{40.} *Birmingham Water Works Co. v. Hubbard*, 85 Ala. 179, 4 So. 607 (1887); the jury exonerated the plaintiff from contributory negligence. In *Carter v. Towne*, 103 Mass. 507 (1870), it appeared that the plaintiff, a child of eight, had handed gun-powder to her mother, after buying it from the defendant, and thus the latter escaped the liability, which he was held in 98 Mass. 567, *supra*, to have incurred; his negligent sale, and delivery to the child, was not the proximate cause of the child's injury from the explosion. See *Gartin v. Meredith*, 153 Ind. 16, 63 N. E. 936 (1897).

^{41.} *Salisbury v. Erie Ry.*, 66 N. J. L. 233, 50 At. 117, 55 L. R. A. 578, 88 Am. St. R. 480 (1911); defendant held liable for negligent use of handcar, by one to whom foreman had loaned it; *Winkler v. Car. & N. W. Ry.*, 126 N. C. 370, 35 S. E. 621, 78 Am. St. R. 663 (1900); defendant held liable for negligently maintaining a barbwire fence.

✓ druggist a jar of belladonna, negligently labeled "extract of dandelion," he is liable to any one who sustains injury by using the drug as dandelion.⁴² Again, a person, who sells or rents an article, which he knows, or is legally bound to know, is imminently dangerous to life or limb, to another, without giving notice of its qualities, is liable to any person who suffers injury therefrom, which might have been reasonably anticipated.⁴³ Especially is this true, when the defendant has been guilty of fraudulent or unjustifiable concealment of dangerous defects.⁴⁴

550. Cases coming within these principles are to be distinguished from those falling within the general rule that a contractor, manufacturer, vendor or bailor is not liable to third parties, who have no contractual relations with him, for negligence, as distinguished from fraudulent or wanton conduct in the construction, manufacture, sale or bailment of property.⁴⁵ It is frequently diffi-

42. *Thomas v. Winchester*, 6 N. Y. Dec. 404 (1856); *Elkins v. McKean*, 397, 57 Am. Dec. 455 (1852); *Accord*, 79 Pa. 493 (1875); *Elliott v. Hall*, Blood-Balm Co. v. Cooper, 83 Ga. 457, 15 Q. B. D. 315, 54 L. J. Q. B. 518 10 S. E. 118, 5 L. R. A. 612, 20 Am. (1885); *Parry v. Smith*, 4 C. P. D. St. R. 324 (1889); *Norton v. Sewall*, 325, 48 L. J. C. P. 731 (1879); *Ward* 106 Mass. 143, 8 Am. R. 298 (1870); *v. Pullman Co.*, 138 Ky. 554, 128 S. Davis v. Guarnieri, 45 O. St. 470, 15 W. 606, 25 L. R. A. N. S. 343 (1910); N. E. 350, 4 Am. St. R. 548 (1887); *Olds Motor Works v. Shaffer*, 145 Ky. Wise v. Morgan, 101 Tenn. 273, 48 616, 140 S. W. 1047, 37 L. R. A. N. S. S. W. 971 (1898); *Peters v. Johnson*, 560 (1911), defective auto seat; *Stat-* 50 W. Va. 644, 41 S. E. 190, 57 L. R. ler v. Ray Mfg. Co., 195 N. Y. 478, A. 428 (1902); *George v. Skivington*, 88 N. E. 1063 (1909), coffee urn for L. R. 5 Ex. 1, 38 L. J. Ex. 8 (1869); boiling large quantity at hotel. *Roberts v. Anheuser-Busch Brewing Association*, 211 Mass. 449, 98 N. E. 95 (1912).

✓ 43. *Lewis v. Terry*, 111 Cal. 39, 43 N. W. 1103, 15 L. R. A. 818, 32 Am. Pac. 398, 31 L. R. A. 220, 52 Am. St. St. R. 559 (1892); *Kahner v. Otis* R. 146 (1896), a folding bed; *Hayes v. Phil., etc., Ry.*, 150 Mass. 457, 23 Elevator Co., 96 App. Div. 169, 89 N. N. E. 225 (1890); *Necker v. Harvey*, Y. Supp. 185 (1904); *contra*, *Kuell-* 49 Mich. 517, 14 N. W. 503 (1883); ing v. Roderick Lean Mfg. Co., 88 App. Div. (N. Y.) 309 (1903). *Barrett v. Lake Ont. Co.*, 174 N. Y. 45. *Heizer v. Kingsland, etc., Co.*, 310, 66 N. E. 968, 61 L. R. A. 829 110 Mo. 605, 19 S. W. 630, 15 L. R. (1903); *Schutte v. United Elec. Co.*, A. 821, 33 Am. St. R. 481 (1892); 68 N. J. L. 435, 53 At. 204 (1902); *Curtin v. Somerset*, 140 Pa. 70, 21 At. Carson v. Godley, 26 Pa. 111, 67 Am. 244, 12 L. R. A. 322, 23 Am. St. R.

cult to determine to which of the foregoing classes a particular case belongs, and different courts have drawn inconsistent inferences from similar states of fact. But the rule of law applicable when the question of fact has been settled, is not in dispute.

When the sale of the article is prohibited by statute, because of its dangerous character, the original seller will usually be liable to remote parties injured by its use, though that use be brought about by interveners, who are also liable.^{45a}

551. Common Carriers, Liverymen, Caterers, etc. Persons engaged in the foregoing and similar callings, whose business directly involves the personal safety and lives of others, and who assume to be specially skilled in their occupations,⁴⁶ are bound, it is said,⁴⁷ to exercise "the most watchful care and the most active diligence; anything short of this is negligence and carelessness, and would furnish clear ground of liability if an injury was thereby sustained." This doctrine has been applied with no little rigor to

220 (1891); *McCaffrey v. Mossberg*, etc., Co., 23 R. I. 381, 50 At. 651, 55 L. R. A. 822 (1901); *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109, 58 U. S. App. 91, 30 C. C. A. 567 (1898); *Stand. Oil Co. v. Murray*, 119 Fed. 572, 57 C. C. A. 1, with valuable note (1902); *Huset v. J. I. Case, etc., Co.*, 120 Fed. 865, 57 C. C. A. 237 (1903), a very valuable case. See also *Ushowski v. Hill*, 61 N. J. L. 375, 39 At. 904 (1898); *Styles v. F. R. Long Co.*, 70 N. J. L. 301, 57 At. 448 (1904); *Slattery v. Colgate*, 25 R. I. 220, 55 At. 639 (1903).

45a. *Pizzo v. Wiemann*, 149 Wis. 235, 134 N. W. 899, 38 L. R. A. N. S. 678 (1912), toy pistols; *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453 (1909), petroleum which did not conform to statutory standard; *Haley v. Swift & Co.*, — Wis. —, 140 S. W. 292 (1913), adulterated food, sold in violation of statute.

46. *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. R. 715 (1885),

case of caterer. Physicians are bound to exercise such skill and care, as are exercised generally by physicians of ordinary care and skill, in similar circumstances. *Burk v. Foster*, 114 Ky. 20, 69 S. W. 1096 (1902); *Gillette v. Tucker*, 67 O. St. 106, 65 N. E. 865 (1902). This duty is owing to the person treated, whether the physician is employed by such person, or by a third party; *Harriott v. Plimpton*, 166 Mass. 585, 44 N. E. 992 (1896), employed by prospective father-in-law; *Dubois v. Decker*, 130 N. Y. 325, 29 N. E. 313, 14 L. R. A. 429 (1891), employed by a hospital.

47. *Hadley v. Cross*, 34 Vt. 586, 588, 80 Am. Dec. 699 (1861); liverymen are not insurers, however, of the safety of their patrons. They are liable only for negligence; *Copeland v. Draper*, 157 Mass. 558, 39 N. E. 944, 19 L. R. A. 283, 34 Am. St. R. 314 (1893). Although slight negligence may be enough, *Horne v. Meakin*, 115 Mass. 326 (1874); *Conn v. Hunsberger*, 224 Pa. 154, 73 At. 324.

common carriers, who employ modern methods of transportation. While they are not insurers of the safety, even of passengers with whom they have contracted, they are bound to exercise a degree of care and vigilance, commensurate with the risk which their route, their rate of speed, and the other conditions, for which they are responsible, subject third persons, whether passengers or those having no contract relation with them. At times, this requires from them the "exercise of extraordinary vigilance aided by the highest skill," and they are liable for "the slightest negligence or fault in this regard."⁴⁸ At other times "a less degree of care is required," they are "bound simply to exercise ordinary care in view of the dangers to be apprehended."⁴⁹

The tort liability of caterers, restauraners and innkeepers to their patrons for unwholesome food rests upon negligence,^{49a} although, as stated at the opening of this paragraph, they are bound to use the most watchful care and due skill in selecting, preparing and serving food.^{49b}

552. Liability of Landowners to Lawful Passers-By. In the absence of a statute imposing specific duties upon landowners and

48. *Penn. Co. v. Roy*, 102 U. S. 451, Y. 443, 450, 20 N. E. 383, 3 L. R. A. 456, 26 L. Ed. 141 (1880); *Ingalls v. Accord*, Ark. Mid. Ry. v. Bills, 9 Met. (59 Mass.) 1, 43 Am. Canman, 52 Ark. 517, 13 S. W. 280 Dec. 346 (1845); *Hegeman v. Western Ry.*, 13 N. Y. 9, 64 Am. Dec. 517 (1855); *B. & O. Ry. v. Wightman*, 29 Gratt (Va.) 431, 445, 26 Am. R. 384 (1877); "The slightest neglect, against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death;" *Searle v. Kanawha Ry.*, 32 W. Va. 370, 9 S. E. 248, (1884); *Redhead v. Midland Ry.*, L. R. 4 Q. B. 370, 38 L. J. Q. B. 169 (1869); *Hyman v. Nye*, 6 Q. B. D. 685, 44 L. T. 919 (1881); *Glennen v. Boston El. Ry.*, 207 Mass. 497, 93 N. E. 700, 32 L. R. A. N. S. 470 (1911).

49. *Kelly v. Manhattan Ry.*, 112 N. Y. 443, 450, 20 N. E. 383, 3 L. R. A. 456, 26 L. Ed. 141 (1880); *Ingalls v. Accord*, Ark. Mid. Ry. v. Bills, 9 Met. (59 Mass.) 1, 43 Am. Canman, 52 Ark. 517, 13 S. W. 280 Dec. 346 (1845); *Hegeman v. Western Ry.*, 13 N. Y. 9, 64 Am. Dec. 517 (1855); *B. & O. Ry. v. Wightman*, 29 Gratt (Va.) 431, 445, 26 Am. R. 384 (1877); "The slightest neglect, against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death;" *Searle v. Kanawha Ry.*, 32 W. Va. 370, 9 S. E. 248, (1884); *Redhead v. Midland Ry.*, L. R. 4 Q. B. 370, 38 L. J. Q. B. 169 (1869); *Hyman v. Nye*, 6 Q. B. D. 685, 44 L. T. 919 (1881); *Glennen v. Boston El. Ry.*, 207 Mass. 497, 93 N. E. 700, 32 L. R. A. N. S. 470 (1911).

49a. *Sheffer v. Willoughby*, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. R. 483 (1896); *Bigelow v. Maine Cen. Ry.*, Me. 85 At. 396 (1912); *Crocker v. Baltimore Dairy Lunch Co.*, Mass. , 100 N. E. 1079 (1913).

49b. *Pantaze v. West*, Ala. 61 So. 42 (1913); *Doyle v. Fuerst & Kraemer*, 129 La. 838, 56 So. 906, 40 L. R. A. N. S. 480 (1911).

occupiers,⁵⁰ they are not absolutely liable to persons lawfully passing by their premises, for harm sustained by such persons from causes originating thereon, unless these sources of harm are nuisances,⁵¹ or unless the harm is due to an act of trespass for which the landowner is responsible.⁵² The measure of duty resting upon the landowner, in other than these exceptional cases, is to make a reasonable and proper use of his land. Whether he has been negligent in the performance of this duty; whether his use of his land is an unnecessary interference with the rights of passers-by, and subjects them to unnecessary danger, must depend upon the facts of each case.⁵³ When he has been thus negligent, and his misconduct has caused harm to a lawful passer-by, he must answer for it.⁵⁴

553. Liability of Landowner to Invited Persons. Towards those expressly or impliedly invited upon one's premises, for mutual advantage, the inviter owes the duty of ordinary care. He is not the insurer of their safety, nor is he bound to exercise extraordinary care in guarding them from harm, unless the nature of his enterprise subjects them to extraordinary danger. Nor is he bound to guard them against harm, to which they unnecessarily expose themselves. But he is under the duty of having those parts of his premises to which they are invited in a reasonably safe condition for them.⁵⁵

50. *Smith v. Milwaukee, etc.* Exchange, 91 Wis. 360, 64 N. W. 1041, 30 L. R. A. 504, 51 Am. St. R. 912 (1895).
frightening plaintiff's horses, and thereby caused them to run away. Jury found this conduct was willful and wanton.

51. *Parker v. Union Woolen Co.*, 42 Conn. 399, 402 (1875).

52. *Smethurst v. Barton Square Church*, 148 Mass. 261, 19 N. E. 387, 2 L. R. A. 695, 12 Am. St. R. 550 (1889).

53. *Wolf v. Des Moines Elec. Co.*, 126 Ia. 659, 98 N. W. 301 (1904); *Morris v. Whipple*, 183 Mass. 27, 69 N. E. 199 (1903); *Fielders v. Nor. Jersey Ry.*, 68 N. J. L. 343, 53 At. 404, 59 L. R. A. 455, 96 Am. St. R. 552 (1902); *Brendle v. Spencer*, 125 N. C. 474, 34 S. E. 635 (1899). Defendant blew a locomotive whistle, near the highway, for the purpose of

54. *Croghan v. Schiele*, 53 Conn. 186, 55 Am. R. 88 (1885); *Haughey v. Hart*, 62 Ia. 96, 17 N. W. 189 (1883); *Detzur v. Stroh Brewing Co.*, 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500 (1899); *Jager v. Adams*, 123 Mass. 26, 25 Am. R. 7 (1877); *Weller v. McCormick*, 52 N. J. L. 470, 19 At. 1101, 8 L. R. A. 798 (1890); *Beck v. Carter*, 68 N. Y. 283, 23 Am. R. 175 (1877); *Crowley v. Rochester Fireworks Co.*, 183 N. Y. 353, 76 N. E. 470, 3 L. R. A. N. S. 330 (1906).

55. *Indemauer v. Dames*, L. R. 1 C. P. 274, 35 L. J. C. P. 184 (1866); L. R. 2 C. P. 311, 36 L. J. C. P. 181

This class of persons includes those who enter stores, or hotels, or other business places, in accordance with ordinary usage;⁵⁶ tenants of portions of a building and their business callers;⁵⁷ persons calling to pay or collect debts, or make estimates for work in the customary manner;⁵⁸ and others of like sort. Whether a person is within this class, or upon premises as a mere licensee, appears to depend upon the application to the facts of the particular case of "the principle that invitation is inferred, where there is a common interest or mutual advantage, while a license is inferred, where the object is the mere pleasure or benefit of the person using the premises."⁵⁹

554. Liability to Licensees. Inasmuch as a licensee is upon the premises of another for his own benefit or pleasure, we should expect the licensor to be liable only for gross negligence. And such is the view taken in England, and, generally, in this country. He who is receiving the gratuitous favors of another has no such relation to him, it is said, as to create a duty to make safer or better, than it happens to be, the place where hospitality is tendered. The licensee must take the premises as he finds them.⁶⁰ At most, he

(1867); *Croghan v. Schiele*, 53 Conn. Mass. 302, 45 N. E. 923 (1897); 186, 1 At. 899, 55 Am. R. 88 (1885); *Swords v. Edgar*, 59 N. Y. 28, 17 Am. D'Amico v. City of Boston, 176 Mass. R. 295 (1874); *Stenberg v. Wilcox*, 599, 58 N. E. 158 (1900); *Land v.* 96 Tenn. 163, 33 S. W. 917, 24 L. R. Fitzgerald, 68 N. J. L. 28, 52 At. 229 A. 615 (1896); *Miller v. Hancock* (1902); *Springfield Elec. L. & P. Co.* (1893), 2 Q. B. 177. In *Hart v. Cole*, v. Calvert, 231 Ill. 290, 83 N. E. 184, 156 Mass. 475, 31 N. E. 645, 16 L. R. 14 L. R. A. N. S. 782 (1907). A. 557 (1892), it was held that a per-

56. *Sweeney v. Old Colony Ry.*, 10 Allen (Mass.) 368, 87 Am. Dec. 644 (1865); *Brotherton v. Manhat. Beach*

Co., 48 Neb. 563, 67 N. W. 479 (1896). S. C. 50 Neb. 214, 68 N. W. 757 (1897); public bathing beach;

Dinnihan v. Lake Ont. Co., 8 App. Div. 509, 40 N. Y. Supp. 764 (1896);

toboggan slide at a bathing resort; *Houston, etc. Ry. v. Phillio*, 96 Tex. 18, 69 S. W. 994, 59 L. R. A. 392 (1902);

Hupfer v. Nat'l Dist. Co., 114 Wis. 279, 90 N. W. 191 (1902).

57. *Crane Elev. Co. v. Lippert*, 63 Fed. 942 (1894); *Wilcox v. Zane*, 167

Mass. 302, 45 N. E. 923 (1897); *Swords v. Edgar*, 59 N. Y. 28, 17 Am. R. 295 (1874); *Stenberg v. Wilcox*, 599, 58 N. E. 158 (1900); *Land v.* 96 Tenn. 163, 33 S. W. 917, 24 L. R. A. 615 (1896); *Miller v. Hancock* (1893), 2 Q. B. 177. In *Hart v. Cole*, v. Calvert, 231 Ill. 290, 83 N. E. 184, 156 Mass. 475, 31 N. E. 645, 16 L. R. A. 557 (1892), it was held that a per-

son attending a wake, without special request, was not an invited person within the rule.

58. *Peake v. Buell*, 90 Wis. 508, 63 N. W. 1053, 48 Am. St. R. 946 (1895).

59. *Campbell. Negligence*, § 33, quoted with approval in *Bennett v. Ry. Co.*, 102 U. S. 577, 26 L. Ed. 235 (1880); *Alabama G. So. Ry. v. Godfrey*, 156 Ala. 202, 47 So. 185, 190 (1908).

60. *Hounsell v. Smyth*, 7 C. B. N. S. 731, 29 L. J. C. P. 203 (1860); *Gautret v. Egerton*, L. R. 2 C. P. 371, 36 L. J. C. P. 191 (1867); *Rooney v.*

can claim only that the licensor shall abstain from entrapping him to his harm;⁶¹ shall not create new and undisclosed sources of danger, without warning him of the change of situation.⁶²

555. Whether the invited private guest is to be classed with licensees, or with invited persons, is a question upon which judicial opinion is somewhat at variance. In England it is well settled that he is a licensee.⁶³ This, it is submitted, is the true doctrine, when-

Woolworth, 74 Conn. 720, 52 At. 411 active and passive negligence in such (1902); Ill. C. Ry. v. Eicher, 202 Ill. cases.

556, 67 N. E. 376 (1903); Lary v. 62. Beck v. Carter, 68 N. Y. 283, 23 Clev. etc. Ry., 78 Ind. 323, 41 Am. R. Am. R. 175 (1877). The case of 572 (1881); Cumberland, etc. Co. v. Lepnick v. Gaddes, 72 Miss. 200, 16 Martin, 116 Ky. 554, 76 S. W. 394 So. 213, 26 L. R. A. 686, with note, (1903); Settoon v. Tex. etc. Ry., 48 48 Am. St. R. 547 (1894), was de- La. Ann. 807 (1896); Dixon v. Swift, cided on the pleadings, the defendant 98 Me. 207, 56 At. 761 (1903); Rear- having demurred to the declaration; don v. Thompson, 149 Mass. 267, 21 and the court held that a cause of ac- N. E. 369 (1889); Taylor v. Haddon- tion against the licensor was set field, etc. Co., 65 N. J. L. 103, 46 At. forth. When the case came to trial, 707 (1900); Larmore v. Crown Pt. however, the plaintiff failed to show Co., 101 N. Y. 391, 4 N. E. 752 that he had been entrapped, by any (1886); Ann Arbor Ry. v. Kinz, 68 inducement of the defendant. The O. St. 210, 67 N. E. 479 (1903); evidence disclosed that the plaintiff Paolino v. McKendall, 24 R. I. 432, 53 was not invited, or even licensed, to At. 268, 60 L. R. A. 133, 96 Am. St. cross defendant's vacant lot, upon R. 736 (1902); Clapp v. LaGrill, 103 which was an uncovered cistern. See Tenn. 164, 52 S. W. 134 (1899); Fel- S. C. 18 So. 319 (1895); Ingram-Day ton v. Aubrey, 74 Fed. 350 (1896); Lumber Co. v. Harvey, 98 Miss. 11, 53 Ellsworth v. Metheney, 104 Fed. 119 So. 347 (1910); Fox v. Warner-Quin- (1900).

61. Corby v. Hill, 4 C. B. N. S. 556, 27 L. J. C. P. 318 (1858); Gallagher v. Humphrey, 6 L. T. R. N. S. 684, 10 W. R. 664 (1862); Byrne v. N. Y. C. Ry., 104 N. Y. 362, 10 N. E. 539 (1887); Harriman v. Pittsburg, etc. Ry., 45 O. St. 11, 12 N. E. 451, 4 Am. St. R. 507 (1887), torpedoes placed

on track by defendant's servants, in mere wantonness; Campbell v. Boyd, 88 N. C. 129, 43 Am. R. 740 (1883); Davis v. Chic. etc. Ry., 58 Wis. 646, 17 N. W. 406, 46 Am. R. 667 (1883), repudiating the distinction between

63. Southcote v. Stanley, 1 H. & N. 247, 25 L. J. Ex. 339 (1856); Pollock, C. B. said: "The same principle applies to the case of a visitor at a house; whilst he remains there, he is in the same position as any other

ever he is enjoying gratuitous hospitality.⁶⁴ In some of our jurisdictions, however, there is a disposition to work out a species of estoppel against even the private host.⁶⁵ It is well settled, that the guest of a tenant has no greater rights against the landlord than the tenant has⁶⁶ and one invited upon premises for a particular purpose, becomes either a licensee or a trespasser, if he uses it for any other purpose.⁶⁷

556. Liability to Trespassers. We have seen in a previous chapter that a trespasser is not an outlaw. The landowner is bound not to attack him; nor set spring guns or similar dangerous traps for him, without proper warning;⁶⁸ nor subject him to harm by wilful, reckless or wanton conduct.⁶⁹ He is under no duty,

member of the establishment, so far as regards the negligence of the master or his servants; and he must take his chance with the rest;" Bramwell, B., rested his opinion upon the fact, that the falling of the glass from a door upon the plaintiff was due to defendant's omission, as distinguished from commission.

64. Shearman and Redfield, Negligence (5th Ed.), § 706; Thompson's Commentaries on Negligence (2d Ed.), Vol. 1, § 971; Plummer v. Dill, 156 Mass. 426, 1 N. E. 128, 32 Am. St. R. 463 (1892), *semble*; Pigeon v. Lane, 80 Conn. 237, 67 At. 886, 11 Ann. Cas. 371 (1907), plaintiff was riding in defendant's sleigh upon the latter's invitation; Patnode v. Foote, 153 App. Div. 494, 138 N. Y. Supp. 221 (1912). See 57 Sotisiter's Journal, 183 (1913) for a similar case in Bombay.

65. Barman v. Spencer (Ind.), 49 N. E. 9, 44 L. R. A. 815 (1898). Cf. Atlanta Oil Mills Co. v. Coffey, 80 Ga. 145, 4 S. E. 759, 12 Am. St. R. 244 (1887), where plaintiff was on defendant's land to take away goods, given by the latter to the former; Phillips v. Library Co., 55 N. J. L. 307, 27 At.

478 (1893); Davis v. Cent. Cong'l Soc., 129 Mass. 367, 37 Am. R. 368 (1880).

66. McConnell v. Lemley, 48 La. Ann. 1443, 20 So. 887, 34 L. R. A. 609, 55 Am. St. R. 319 (1896); Roche v. Sawyer, 176 Mass. 71, 57 N. E. 216 (1900).

67. Ryerson v. Bathgate, 67 N. J. L. 337, 51 At. 708, 57 L. R. A. 307 (1902).

68. Supra, Chap. 3. But a trespasser who goes upon land, knowing it is thus defended against unlawful intruders, takes the risk of the situation. Magar v. Hammond, 171 N. Y. 377, 64 N. E. 150, 59 L. R. A. 315 (1902).

69. Marble v. Ross, 124 Mass. 44 (1878), defendant kept a vicious stag in a pasture; held to be reckless misconduct. In Quigley v. Clough, 173 Mass. 429, 53 N. E. 884, 45 L. R. A. 500 (1899), the court held that a barb-wire fence, put up to prevent persons from taking a short cut across his lawn, was to be distinguished from an active source of harm, such as a spring-gun or a vicious animal; and a verdict, directed by the trial judge for the defendant, was sustained.

however, to anticipate the presence of trespassers, or to regulate his business conduct with a view to safeguarding them. His duty to a trespasser, it is generally agreed, "is merely negative. He must not go on maliciously, or with disregard for obvious consequences, when he knows of the peril. He is not required to use care to anticipate and discover the peril of such a person, but only to do so after the discovery of the danger. Until then, no legal duty is imposed, because no one by a wrongful act can impose a duty upon another."⁷⁰

Examples of wilful, reckless, or wanton conduct towards a known, or anticipated trespasser, are afforded by the cases noted below.⁷¹

557. Trespasser Converted into Licensee. An express grant of permission to use one's land or chattels is not necessary to save the user from being classed as a trespasser. Permission will be implied from the acquiescence of the property owner in its continued and notorious use, and thus one, who would otherwise be deemed a trespasser, may acquire the more favored position of a licensee.^{71a}

70. *Louisville & N. Ry. v. Palmer v. Gordon*, 173 Mass. 410, Hocker, 111 Ky. 707, 64 S. W. 638, 53 N. E. 909 (1899), defendant 65 S. W. 119 (1901); *Christian v. Ill. C. Ry.*, 71 Miss. 237, 15 So. 71 (1894); *Buch v. Amory Mfg. Co.*, 69 N. H. 257, 44 At. 809 (1898); *Carney v. Concord St. Ry.*, 72 N. H. 364, 57 At. 218 (1903); starting Cleveland, etc., Ry. v. Marsh, 63 O. St. 236, 245, 58 N. E. 821 (1900); a car, under which a child had been Rathbone v. Oregon Ry., 40 Or. 225, 66 Pac. 909 (1901); Singleton v. Felton, 101 Fed. 526, 42 C. C. A. 57 (1900). caught, instead of lifting it; *Smith v. Savannah Ry.*, 100 Ga. 96, 27 S. E. 725 (1896); *Kansas City R. v. Kelly*, 36 Ks. 655, 14 Pac. 172 (1887); *Smith v. Louisville & N. Ry.*, 95 Ky. 11, 23 S. W. 652 (1893); *Farber v. Mo., etc., Ry.*, 139 Mo. 272, 40 S. W. 932 (1897); *Southern Ry. v. Shaw*, 86 Fed. 865, 31 C. C. A. 70 and note (1898). In the last five cases, trespassers were reck-

71. *Western & A. Ry. v. Bailey*, 105 Ga. 100, 31 S. E. 547 (1898), running a train at a reckless rate of speed, and without sounding whistle or bell, after discovering the trespasser; *Ill. C. Ry. v. Leiner*, 202 Ill. 624, 67 N. E. 398 (1903), no attempt made to avoid a collision; the terms wilful and wanton are discussed, at length, in this case; **71a.** *Williams v. Southern Ry. Co.*, 11 Ga. App. 305, 75 S. E. 572 (1912), and authorities cited in the opin-

558. Alluring Infant Trespassers. An exception to the rule of non-liability to trespassers has developed in several jurisdictions. in favor of children. It is stated as follows in a leading case:⁷²

“Although a child of tender years, who meets with an injury upon the premises of a private owner, may be a technical trespasser, yet the owner may be liable, if the things causing the injury have been left exposed and unguarded, and are of such a character as to be an attraction to the child, appealing to his childish curiosity and instincts. Unguarded premises, which are thus supplied with dangerous attractions are regarded as holding out implied invitations to such children.” The argument in favor of this exception rests chiefly upon the assumption that the child is allured by the landowner, and hence cannot be regarded as a voluntary trespasser. But it rests to some extent upon the feeling that landowners ought to have a special regard for the safety of children.⁷³

In reply to this argument it is urged that, if carried to its logical conclusion, it would render the owner of a fruit tree liable

ion; *Swift v. Staten Island R. T. Ry.*, 123 N. Y. 645, 25 N. E. 378 (1890); *Lowery v. Walker* (1911), A. C. 10, 80 L. J. K. B. 138; *Coffee v. McEvoy* (1912), 2 Ir. R. K. B. 95.

72. *City of Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 45 Am. St. R. 114, 27 L. R. A. 206 (1895). The city owned unenclosed lots, whereon were water and timbers, with which children were accustomed to play. The city was held liable for the drowning of a trespassing child, in this alluring flood; *Franks v. Southern Cotton Oil Co.*, 78 S. C. 10, 58 S. E. 960, 12 L. R. A., N. S. 468 (1907).

73. In *Keffe v. Mil., etc., Ry.*, 21 Minn. 207, 18 Am. R. 393 (1875), the court said: “Now, what an express invitation would be to an adult, the temptation of an attractive play ground is to a child of tender years. If the defendant had left its turntable, unfastened, for the purpose of attracting young children to play upon it, knowing the danger into which it was alluring them, it would certainly be no defense to an action by the plaintiff, who had been attracted upon the turntable and injured, to say, that the plaintiff was a trespasser, and that his childish instincts were no excuse for his trespass.” In Thompson’s *Commentaries on Negligence* (2 Ed.) 1026, the learned author says: “One doctrine under this head is, that if a child trespasses upon the premises of the defendant, and is injured in consequence of something that befalls him while trespassing, he cannot recover damages, unless the injury was wantonly inflicted, or was due to the recklessly careless conduct of the defendant. This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of

for damages to a trespassing boy, who, in attempting to get the fruit, should fall from the tree and be injured, or who should be made sick by eating green, or harmful fruit; that it would charge the duty of protecting children upon every member of the community, except upon their own parents.⁷⁴

559. Authorities for the Infant. These begin with *Lynch v. Nurdin*,⁷⁵ in England, and *Stout v. Sioux City Ry.*,⁷⁶ in this country. In the English case, the defendant's carman went into a house, leaving his horse and cart unwatched and unfastened in the street for half an hour. During this period, the plaintiff, a lad of seven, and several other children began playing with the outfit. He got upon the cart; and was thrown under the wheel and run over, by reason of one of his companions starting the horse. At the trial, defendant's counsel asked the court to direct the jury that the plaintiff could not recover, as his own negligence brought the mischief upon him. This was refused, and the jury were told that it was for them to say, first, whether it was negligent to leave the horse and car at they were left; and, second, whether that negligence occasioned the accident. This refusal and direction were upheld by the appellate court. The Lord Chief Justice declared, that the case presented more than the want of care on the plaintiff's part. "We find in it," he said, the positive misconduct of the plaintiff—an active instrument towards the effect. We have here express authorities for our guidance." He then proceeds to discuss the spring-gun⁷⁷ and dog-spike⁷⁸ cases, as the proper authorities for the case in hand. After stating them, he proceeds: "A distinction may be taken between the willful act done by the defendant in those cases, in deliberately planting a dangerous weapon in his ground with the design of destroying trespassers, and the mere negligence of the defendant's servant in

the child, indeed his inability to be a trespasser in sound legal theory, and visits upon him the consequences of his trespass, just as though he were an adult." 2 Dillon (U. S. C. C.) 294, Fed. Cases, 13, 504 (1872). Affirmed as *Ry. Co. v. Stout*, 17 Wall (U. S.) 657, 21 L. Ed. 745 (1873).

74. Brinkley Car Works v. Cooper, 70 Ark. 331, 67 S. W. 752 (1902). **77. Ilott v. Wilkes,** 3 B. & Ald. 304, 22 R. R. 400 (1820); *Bird v. Holbrook*, 4 Bing. 628, 29 R. R. 657 (1828).

75. 1 Q. B. 29, 10 L. J. Q. B. 73 (1841). **78. Deane v. Clayton,** 7 Taunt. 489,

76. Stout v. Sioux City etc. Ry., 18 R. R. 553 (1817).

leaving his car in the open street. But between willful mischief and gross negligence, the boundary line is hard to trace; I should say, impossible." Accordingly he concludes, it was for the jury to say whether the defendant's misconduct amounted to gross negligence and so brought him within the doctrine of *Bird v. Holbrook*.⁷⁹ He says, "They would naturally inquire whether the horse was vicious or steady; whether the occasion required the servant to be so long absent from his charge, and whether in that case no assistance could have been procured to watch the horse; whether the street was at that hour likely to be clear or thronged with a noisy multitude; especially whether large parties of young children might be reasonably expected to resort to the spot. If this last mentioned fact were probable, it would be hard to say that a case of gross negligence was not fully established."^{79a}

560. Although this case has been approved recently in England,⁸⁰ it has also been doubted by eminent judges,⁸¹ and its doctrine is certainly inconsistent with some later cases,⁸² unless it is to be limited to misconduct toward trespassing children, which is positively unlawful or wanton.⁸³

79. *Supra*, note 177.

79a. A similar case is *Cahill v. E. B. & A. L. Stone & Co.*, 153 Cal. 571, 96 Pac. 84, 19 L. R. A. N. S. 1094 (1908), with extended note.

80. In *Harrold v. Watney*, (1898) 2 Q. B. 320, 67 L. J. Q. B. 771, one of the judges spoke of *Lynch v. Nurdin*, as never having been questioned; and cited it as authority for the court's decision in the case at bar. This judge unhesitatingly declared, that defendant's fence adjoining the highway was so insecure as to be a nuisance; that had an adult leaned against it to tie his shoe-string and it had fallen on him, as it fell on plaintiff, while trying to scale it, the adult would have had an action. The case does not range itself on the side of the turn-table and similar cases in this country.

81. Alderson B., in *Lygo v. Newbold*, 9 Exch. 302, 305, 23 L. J. Ex. 108 (1854).

82. *Hughes v. Macfie*, 2 H. & C. 744, 33 L. J. Ex. 177 (1863). Defendant had raised his cellar-flap against the wall of his house and plaintiff, a child of seven, wrongfully played with it and was injured. No recovery was allowed; *Mangan v. Atterton*, L. R. 1 Ex. 239, 35 L. J. Ex. 161 (1866). A machine for crushing oil cake was left in a public place, and plaintiff, a child of four, had his fingers smashed, while playing with it. No recovery was allowed.

83. *Clark v. Chambers*, 3 Q. B. D. 327, 47 L. J. Q. B. 427 (1878), defendant unlawfully obstructed with chevaux-de-frise plaintiff's road. Plaintiff stumbled over the obstruction in the dark and put out an eye.

Since the appearance of the first edition of this work, *Lynch v. Nurdin* has been referred to approvingly in the House of Lords,^{83a} although the case then under consideration was decided in favor of the infant on the ground that he was a licensee in fact. Even though thus limited, it is proving an inducement to numerous unfounded suits.^{83b}

561. Railroad Company v. Stout.^{83c} In this case, it appeared that the railroad company maintained a turntable on its land, which had been constructed and was used in the ordinary way, in the company's business. It was about a quarter of a mile from the company's station-house, in an unfenced lot. There were but few houses in the neighborhood, and plaintiff's house was three-quarters of a mile away. He, a boy of six years, with two other boys a little older, went to the turntable and finding it unlocked and unwatched, began playing with it. His comrades turned it, and his foot was caught and crushed, while he was attempting to step from the main track upon it. The trial judge charged the jury, that they were to decide whether the turntable in the situation, condition and place where it was, was a dangerous machine; that if it was not dangerous, the company was not liable for negligence; that they were to further consider whether, situated as it was on defendant's property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur, if it was left unlocked and unguarded; that if the company did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence. The jury found a verdict for \$7,500 for the plaintiff. Upon appeal, the judgment entered upon this verdict was affirmed

Defendant was held liable. See Clerk and Lindsell, *Torts* (2 Ed.) pp. 436-437, where it is declared, that *Lynch v. Nurdin* cannot be regarded as law in opposition to *Hughes v. Macfie* and *Mangan v. Atterton*. *Seven Negligence* (2 Ed.) Vol. 1, pp. 183-190, and Pollock, *Torts* (6 Ed.) 43, 457, support the doctrine of *Lynch v. Nurdin*, as to trespassing children.

83a. *Cook v. Midland G. W. Ry.* (1909), A. C. 229, 234, 237, 78 L. J. P. C. 76. In a note on p. 242, the text of the first edition is cited.

83b. *Jenkins v. Great Western Ry.* (1912), 1 K. B. 525, 81 L. J. K. G. 378; see Pollock on *Torts* (9th Ed.), pp. 46, 487, 536; *Latham v. Johnson* (1913), 1 K. B. 398, 82 L. J. K. B. 258; 29 *Law Quart. Rev.* 122.

83c. 17 Wall. (U. S.) 657 (1873).

by the Supreme Court of the United States. Mr. Justice Hunt, delivering the unanimous judgment of this court, declared that "while a railway company is not bound to the same degree of care in regard to mere strangers, who are unlawfully upon its premises, that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence." He also said: "That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might be fairly inferred from the injury which actually occurred to the plaintiff. There was the same liability to injure him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury by his foot being caught between the fixed rail of the road-bed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents. So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turntable upon other occasions, and within the observation and to the knowledge of the employees of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case. As it was in fact upon this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on or about it. This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy latch, which by dropping into a socket, prevented the revolution of the turntable. There had been one on this table, weighing some eight or ten pounds, but it had been broken off and had not been replaced. It was proved to have been usual with railroad companies to have upon their turntables a latch or bolt, or some similar instrument. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the trouble to lift it out, and thus the whole diffi-

culty would have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given; that it was negligent, and that its negligence caused the injury to the plaintiff."

562. The doctrine of this case has been repeatedly affirmed by the Supreme Court,⁸⁴ and has been adopted by many state tribunals. In one of the earliest and ablest opinions⁸⁵ upon this side of the controversy, it is said, that "what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years;" that while the defendant did not leave the turntable unfastened for the purpose of injuring young children, yet "the defendant knew that by leaving this turntable unfastened and unguarded it, it was not merely inviting young children to come upon the turntable, but was holding out an allure-ment which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger, without their fault (for it cannot blame them for not resisting the temptation it has set before them), it was bound to use care to protect them from the danger into which they were thus led; and from which they could not be expected to protect themselves,—the difference between the plaintiff's position and that of a voluntary trespasser, capable of using care, consists in this, that the plaintiff was induced to come upon the defendant's turntable by the defendant's own conduct, and that, as to him, the turntable was a hidden danger,—a trap."

563. **Alluring Nuisances.** Situations of this kind are often spoken of as attractive or alluring nuisances. "One may not bait his premises," it is said, "with some dangerous instrument or quality, alluring to the incautious or vagrant, and then deny re-

84. *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410 (1844); *Union P. Ry. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 484 (1893). In the latter case, the Railroad Co. had failed to fence the slack-pit, as it was required by statute to do; and its servants deliberately frightened plaintiff into running over the unfenced slack-pit, where he received his injuries.

85. *Keefe v. Mil., etc., Ry.*, 21 Minn. 207, 18 Am. R. 393 (1875). The opinion of the trial judge who granted a motion for judgment for defendant on the pleadings, may be read in 2 Cent. L. J. 170.

sponsibility for the consequences of following the natural instincts of curiosity or amusement aroused thereby, without taking reasonable precautions to guard against the accidents liable to ensue. Rights can only be enjoyed subject to those limitations which regard for the weaknesses and deficiencies of others dictate to be humane and just. This rule has been applied, not only in the turntable cases, but to others in which dangerous situations have been negligently maintained, and especially to cases of death or injury by falling into unguarded pools or vats of water.”⁸⁶

564. Converting Trespassers into Baited Victims. It will be observed that the foregoing doctrine rests upon the conversion of the infant trespasser into an innocently baited victim. And this conversion is wrought by the magic of a legal fiction. The landowner does not construct the turntable, or reservoir, nor make the excavation or other change in his premises, with a view to bait⁸⁷

86. *Price v. Atchison Water Co.*, 58 Ks. 551, 50 Pac. 450, 62 Am. St. R. 625 (1897). Plaintiff's son of eleven years was drowned while fishing in defendant's reservoir. The trial court non-suited the plaintiff, but the appellate court held that whether the defendant was negligent in maintaining dangerous reservoirs, and whether plaintiff was guilty of contributory negligence were questions for the jury. In *Consol. Elec. Co. v. Healy*, 65 Ks. 798, 70 Pac. 884 (1902), the court defined an attractive nuisance as “a place which, though patently dangerous to those of ordinary knowledge and prudence, is so enticing to others excusably lacking in intelligence and caution as to induce them to venture into it;” and declared, that the rule of liability for resulting injuries “applies to one, who maintains on his own premises a dangerous instrumentality, not in itself attractive, but placed in such immediate proximity to an attractive situation, on the

premises of another, as to form with it a dangerous whole, notwithstanding the attractive situation on the other premises may not of itself be dangerous. In *Haynes v. City of Seattle*, 69 Wash. 419, 125 Pac. 147 (1912), this doctrine was applied against a city, whose authorities allowed electric light wires to be loosely strung in a street, in front of a school house. Plaintiff, a boy of nine, while playing with the wires was caught in a coil and injured.

87. *Townsend v. Wathen*, 9 East. 277 (1808), is usually cited on this point. But in that case, plaintiff alleged, and gave evidence tending to prove, that the defendant deliberately set the traps “wrongfully intended to catch, maim and destroy the plaintiff's dogs.” No one would say that a landowner who actually intended to entrap and injure trespassing children, or adults, would not be liable for injuries resulting from such intentional traps. In *Ponting v. Noakes* (1894), 2 Q.

children to their destruction, but with a view to the beneficial use of his land. Nothing is further from his wish or thought than alluring anybody to his premises. And yet, if the lawful changes in his property do allure vagrant infants, whose parents are unable or unwilling to properly control them, the law imposes upon him a duty of care towards them which, it is admitted, he owes to nobody else.^{87a}

565. In rejecting this doctrine, the Supreme Court of Michigan recently said: "We have only to add that every man who leaves a wheelbarrow, or lawnmower, or spade, upon his lawn; a rake with its sharp teeth pointing upward, upon the ground, or leaning against a fence; a bed of mortar prepared for use in his new house; a wagon in his barnyard, upon which children may climb, and from which they may fall; or who turns in his lot a kicking horse or a cow with calf—does so at the risk of having the question of his negligence left to a sympathetic jury. How far does this rule go? Must his barn door, and the usual apertures through which the accumulations of the stable are thrown, be kept locked and fastened, lest 12 year old boys get in and be hurt by the animals, or by climbing into the haymow and falling from the beams? May a man keep a ladder or a grindstone or a scythe or a plow or a reaper without danger of being called upon to reward trespassing children, whose parents owe and may be presumed to perform the duty of restraint? Does the new rule go still further and make it necessary for a man to fence his gravel pit or quarry? And if so, will an ordinary fence do, in view of the known propensity and ability of boys to climb fences? Can a man safely nowadays own a small lake or fish pond? and must he guard ravines and precipices upon his land? Such is the evolu-

B. 281, 63 L. J. Q. B. 549, defendant was held not liable for the death of plaintiff's horse, due to the latter's eating from a yew tree, which was wholly on defendant's land; the court distinguishing *Townsend v. Wathen*, as a case where the wrongful intention was the gist of the action.

that, "where a vat of hot grease was located about 11 feet from the line of a street, and was 12 inches in depth, 11 feet long, and 8 feet wide, and only a few inches above the surface of the ground, the question of defendant's negligence in an action for the death of a boy about five years old, who fell into the vat, was for the jury."

^{87a}. *Duffy v. Sable Iron Works*, 210 Pa. 326, 59 At. 1100 (1904), holds

tion of the law, less than twenty years after the decision of *Railroad Company v. Stout*, when with due deference, we think some of the courts left the solid ground of the rule, that trespassers cannot recover for injuries received, and due merely to negligence of the persons trespassed upon.”⁸⁸

566. **Hardship for the Landowner.** The courts which impose upon the landowner a special guardianship over vagrant infants, trespassing upon his alluring premises, declare that there is no real hardship in this doctrine. When such a trespasser is a mere “hoodlum, disregarding property rights from mere love of mischief, and taking risks out of mere bravado, or in conscious defiance of moral and legal restraint, and is thus injured, we may pity his folly, but justly say, as the law says, that having intelligently assumed the risk, he ought not to recover damages.”⁸⁹ But, who is to say whether the trespassing infant comes within the category of “hoodlum” or of “baited victim?” The jury, say these courts. The jury will also be called upon to determine whether the premises are dangerously alluring, and whether the defendant has used proper care in guarding his alluring premises. As a practical result, the landowner is saddled with the responsibility of an insurer of infants, who are curious and agile enough to trespass upon lands, having alluring improvements, which may be dangerous for them.⁹⁰

88. *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644, 92 Am. St. R. 481, 55 L. R. A. 310 (1901).

89. *Edgington v. Burl. etc. Ry.*, 116 Ia. 410, 90 N. W. 95, 57 L. R. A. 561 (1902). *Accord*, *Ala. G. S. Ry. v. Crocker*, 131 Al. 584, 31 So. 561 (1901); *C. B. & Q. Ry. v. Krayenbuhl*, 65 Neb. 889, 91 N. W. 880 (1902).

90. Professor Jeremiah Smith, *Landowner's Liability to Children*, 11 Harv. L. R. 349, 434. At. p. 438 he says: “Suppose even that the judge goes still further (much further indeed it is believed than judges have usually gone), and tells the jury that, in determining what

is reasonable care, they should take into account not only the desirability of preserving innocent children from harm, but also the desirability of making beneficial use of land. How much weight will the jury allow to the latter consideration, when put in competition with the former, in a concrete case, appealing to their sympathies? How much consideration will they give to the general impolicy of hampering the use of land with troublesome and expensive restrictions, when they have before them a maimed child, or the mourning relatives of a deceased infant?”

567. Reaction from Railroad Company v. Stout. In a number of states, whose courts followed the lead of the Supreme Court, in the turntable cases, a halt has been called, and a disposition is shown to limit the doctrine of those cases, rather than to extend it. The Supreme Court of Georgia has frankly avowed this purpose; and has ruled, that even a railroad company is not bound to fence or guard an excavation upon its premises, so as to prevent injuries to children trespassing thereon, although the excavation and its surroundings have an alluring attraction for children.⁹¹

A similar reaction is observable in California,⁹² Missouri⁹³ and Texas.⁹⁴

91. Savannah, etc., Ry. v. Beavers, 113 Ga. 398, 39 S. E. 82, 54 L. R. A. 314 (1901). The court quotes at length from Prof. Jeremiah Smith's articles, in 11 Harv. L. R. 349, 434, and commends them as a learned and exhaustive treatise upon the subject of the liability of landowners to children. The court had committed itself to the doctrine of Ry. Co. v. Stout, in a turntable case, *Ferguson v. Col. etc. Ry.*, 75 Ga. 637, 77 Ga. 102 (1886)—but expressed its determination to "limit the doctrine to the turntable cases." The same determination was stated, again, in *O'Connor v. Brucker*, 117 Ga. 451, 453, 43 S. E. 731 (1903), a case where a trespassing child was allured into a vacant house, by reason of its being unlocked. See, too, *Mayfield Water & L. Co. v. Webb's Adm'r*, 129 Ky. 395, 111 S. W. 712, 18 L. R. A. N. S. 179 (1908); *Thompson v. Cumberland T. & T. Co.*, 138 Ky. 109, 127 S. W. 531 (1910); *St. Louis & S. F. Ry. v. Williams*, 98 Ark. 72, 135 S. W. 804, 33 L. R. A. N. S. 94 (1911); *Hart v. Mason City B. & T. Co.*, Ia. , 135 N. W. 423, 38 L. R. A. N. S. 1173 (1912).

92. In Barrett v. Southern Pac. Ry., 91 Cal. 296, 27 Pac. 666, 25 Am.

St. R. 186 (1891), the Supreme Court followed Ry. Co. v. Stout, in a turntable case, but declined to extend the doctrine to an alluring pond, in *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 114, 598, 56 Am. St. R. 106 (1896), and to alluring street cars left unattended upon the car tracks at the end of the line, in *George v. Los Angeles Ry.*, 126 Cal. 357, 58 Pac. 819, 46 L. R. A. 829 (1899). See *Cahill v. E. B. & A. L. Stone & Co.*, 153 Cal. 571, 96 Pac. 84, 19 L. R. A. N. S. 1094 (1908), with extended note.

93. Koons v. St. Louis, etc., Ry., 65 Mo. 592 (1877), committed the court in a turntable case; followed in *Berry v. St. Louis M. & S. E. Ry.*, 214 Mo. 593, 114 S. W. 27 (1908), but in *Overholt v. Velths*, 93 Mo. 422, 6 S. W. 74 (1887), the court refused to apply the doctrine against the owner of an abandoned but alluring quarry; and in *Barney v. Hannibal etc. Ry.*, 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847 (1894), it refused to apply the doctrine against a railroad company which failed to fence in its freight yard.

94. Missouri, K. & T. Ry. v. Edwards, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825 (1896), reversing S. C. in 32 S. W. 815 (1895).

In the last cited case, the Supreme Court of Texas said of the "turntable cases:"⁹⁵ "This line of decisions has not been uniformly followed, and has met with much adverse criticism, and it seems to us that, with respect to the care which the owner of land is required to exercise, in order to secure from injury children who may trespass upon it, they go to the limit of the law. They proceed upon the ground that turn-tables are attractive to children. In both of the cases cited, stress was laid upon this fact, and also upon the fact that the use of turn-tables by the children was known to the servants of the defendants. The ruling in these cases, we think, must be justified upon one of two grounds; either that the turn-tables possess such peculiar attractiveness, as playthings for children, that to leave them exposed should be deemed equivalent to an invitation to use them, or that, when unsecured, they are so obviously dangerous to children that, when it is discovered that they are using them, it is negligent on the part of the owner not to take some steps to guard them against the danger. But when it is said that it is enough that the object or place is attractive or alluring to children, and when it is said, as has been intimated, that the fact that they resort to a peculiar locality is evidence of its attractiveness, the question suggests itself, what object or place is not attractive to very young persons who are left free to pursue their innate propensity to wander in quest of amusement? What object at all unusual is exempt from infantile curiosity? What place, conveniently accessible for their congregation, is free from the restless feet of adventurous truants?"

568. Repudiation of Railroad Company v. Stout. In many jurisdictions,⁹⁶ the doctrine announced by *Railway Company v. Stout* has been squarely repudiated, and the rule has been laid down, that "no distinction exists between adults and infants when entering uninvited upon lands of another, with relation to the

⁹⁵. *Evanisch v. Gulf etc. Ry.*, 57 Tex. 126, 44 Am. R. 586 (1882); *McPadden*, 79 Conn. 367, 65 At. 157, and *Ry. Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745 (1873), were cited as samples of this class of cases.

⁹⁶. Some of the cases not heretofore nor hereafter cited are the following: *Brinkley Car Works v. Cooper*, 70 Ark. 331, 67 S. W. 752, 57 L. R. A. 724 (1902); *Wilmot v. McPadden*, 79 Conn. 367, 65 At. 157, 19 R. L. A. N. S. 1101 (1906); *Schauf's Admin'r v. City of Paducah*, 106 Ky. 228, 50 S. W. 42, 90 Am. St. R. 220 (1899); *Turess v. N. Y. etc. Ry.*, 61 N. J. L. 314, 40 At. 614 (1898); *McAlpin v. Powell*, 70 N. Y. 126 (1877); *Briscoe v. Hen-*

duty which the owner or occupier of such lands owes to them.”⁹⁷ The learned judge, writing the opinion in the case last cited, said: “It must be conceded, I think, that the rule which imposes liability upon the landowner is a hard one, so far as he is concerned in this respect; that no matter how carefully he may endeavor to protect himself by discharging the duty which the law places upon him, the probability of failure is great. When contemplating the alteration of his land, from the condition in which nature left it, for the purpose of obtaining a more beneficial user therefrom, he must first consider whether the alteration will render it attractive to children of tender years, and, if so, whether they will be subjected to danger if they succumb to the attraction. If he honestly concludes that the change will not operate to attract children, and that, therefore, although it may make his property dangerous, he is under no obligation to provide for their safety, or if he concludes that, although the alterations may render his property attractive to children, they will not incur danger by coming upon it, and for either of these reasons fails to take precautions for their safety, it will be for the jury to say whether he must answer for the result, if injury to a child follows upon his omissions; and their verdict will depend upon whether, in their opinion, he had a reasonable ground for his conclusion. So too, if he appreciates that the change which he proposes to make will render his premises dangerously attractive to children, and takes precautions to exclude them therefrom, it is still possible that they may elude his vigilance, and receive hurt while trespassing; and when that occurs, it at once becomes a question for the jury to say, whether or not the injury was the result of the care, on the part of the landowner, in affording that protection which his duty required. What the conclusion of the jury would be in any given case, of course, no one can tell. The fact, however, is suggestive that in every reported case, so far as I have examined them (and I have examined many), where this doctrine has been under consideration, it has

derson L. & P. Co., 148 N. C. 396, 62 218 Pa. 444, 67 At. 768, 19 L. R. A. S. E. 600, 19 L. R. A. N. S. 1116 N. S. 1162 (1907); *Cooper v. Over-* (1908); *Railroad Company v. Har-* ton, 102 Tenn. 211, 52 S. W. 183, 45 vey, 77 Oh. St. 235, 83 N. E. 66, L. R. A. 591 (1899). 19 L. R. A. N. S. 1136 (1908), with 97. *D. L. & W. Ry. v. Reich*, 61 N. a full citation and analysis of de- J. L. 643, 40 At. 682, 41 L. R. A. cisions; *Thompson v. Bal. & O. Ry.*, 831, 68 Am. St. R. 727 (1898).

always been the landowner, and never the injured child, who was trying to avoid the result of the verdict of the jury. It is only in those cases, where the action of the jury has been controlled by the trial court, that the injured child has sought a review. The probability that the landowner will not be able to avoid liability for injuries to children who come upon his lands without invitation, no matter how careful he may have been, while it affords no reason for denying the existence of the rule which holds him to responsibility, certainly requires that we should not accept it as sound unless it rests upon a solid foundation."

569. Similar views have been announced by the courts of other states.⁹⁸ It is quite apparent, therefore, that the tide of judicial opinion is setting strongly against the doctrine of *Railroad Company v. Stout*. This has been admitted by one of the most enthusiastic advocates of the doctrine.⁹⁹ The present writer does not share that learned and lamented author's regret over this change in the tide. On the other hand, he views it as the result of the sober, second thought of the bench and the bar.¹⁰⁰

98. *Daniels v. N. Y. etc. Ry.*, 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248, 26 Am. St. R. 253 (1891); *Frost v. Eastern etc. Ry.*, 64 N. H. 220, 9 At. 790, 10 Am. St. R. 396 (1886); *Walsh v. Fitchburg Ry.*, 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 724, 45 Am. St. R. 615 (1895); *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. R. 365 (1882); *Paolino v. McKendall*, 24 R. I. 432, 53 At. 268, 60 L. R. A. 133 (1902); *Uthermolen v. Boggs Run Co.*, 50 W. Va. 457, 40 S. E. 410, 55 L. R. A. 911, 88 Am. St. R.

884 (1901), and cases cited in preceding notes.

99. Thompson, *Commentaries on Negligence*, Vol. 7, § 1031 (1901).

100. The following cases apply this sober second thought to trespassing infants injured by alluring and unguarded fires. *Erickson v. Great Nor. Ry.*, 82 Minn. 60, 51 L. R. A. 645, 83 Am. St. R. 410, 84 N. W. 462 (1902); *Madden v. Boston & Me. Ry.*, 76 N. H. 369, 83 At. 129, 39 L. R. A., N. S. 1058 (1912), with note.

CHAPTER XVI.

TORT LIABILITY OF TELEGRAPH AND TELEPHONE COMPANIES.

§ 1. THEIR LEGAL STATUS.

570. **Is It That of Common Carrier?** There is some judicial authority for the view that these companies are common carriers. The Supreme Court of California declared in an early case,¹ "There is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The process of ascertaining damages is the same in this as in other cases of carriers." In a more recent case the Supreme Court of Indiana, after referring to the fact that the telephone is a discovery of recent date, said: "The relations which it has assumed towards the public make it a common carrier of news, a common carrier in the sense in which the telegraph is a common carrier, and impose upon it certain well defined obligations of a public character."²

In some of our states the legal status of telegraph and telephone companies is fixed by constitutional or statutory provisions as that of common carriers.³ It is apparent from the statutes cited in

1. *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589 (1859). *Accord. Wes. Un. Tel. Co. v. Meek*, 49 Ind. 53 (1874). This doctrine has been changed by the Civil Code of California: "§ 2168. Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry." It is provided by § 2162, that, "A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages."

2. *Hockett v. The State*, 105 Ind. 250, 258, 5 N. E. 178, 55 Am. Rep. 201 (1885).

3. Constitution of Ky., § 199, "All such companies are hereby declared to be common carriers and subject to legal control."

Minn. Rev. Laws, 1905, § 2928, declares that they are common carriers and must serve all without discrimination or preference, for a reasonable compensation. Constitution of Miss. § 195: "Express, telegraph, telephone and sleeping car companies are declared common carriers in their respective lines of

the last preceding note that the present tendency of legislation is towards the adoption of the early California and the Indiana doctrine.

571. **The prevailing view**, in the absence of statutory or constitutional provision, is that telegraph and telephone companies are not to be classed as common carriers. Perhaps, the best statement of the reasons for this view is found in the following extract from a leading Massachusetts case:⁴ "The liability of a telegraph company is quite unlike that of a common carrier. A common carrier has exclusive possession and control of the goods carried, with peculiar opportunities for embezzlement or collusion with thieves. The identity of the goods received with those delivered cannot be mistaken; their value is capable of easy estimate, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods. A telegraph company is entrusted with nothing but an order or message, which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity, and is peculiarly liable to mistake; which cannot be the subject of embezzlement; which is of no intrinsic value; the importance of which cannot be estimated except by the sender, nor ordinarily disclosed by him without danger of defeating his own purposes; which may be wholly valueless, if not forwarded immediately; for the transmission of which there must be a simple rate of compensation; and the measure of damages for a failure to transmit or deliver which, has no relation to any value which can be put on the message itself."⁵

business, and subject to liability as such." Nebraska, Laws 1907, ch. 90, § 4. Nevada, Laws 1907, ch. 44, Title of Act. North Dakota, Revised Codes, 1905, §§ 5671, 5672, 5699; Oklahoma, Wilson's Rev. & Ann. St. 1903, § 700; Blackwell M. & E. Co. v. West. Un. Tel. Co., 17 Okla. 376, 89 Pac. 235 (1906); South Carolina, Constitution of 1895, Art. ix, § 3. South Dakota, Revised Codes of 1913, §§ 564, 1576, 1577, 1604; Laws 1907, ch. 239, § 2.

4. Grinnell v. Western Un. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485 (1873).

5. Similar reasons were assigned or approved in the following cases: Tyler v. Western Un. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38 (1871); Smith v. Western Un. Tel. Co., 83 Ky. 104, 112, 4 Am. St. Rep. 126 (1885), nullified by Constitution, § 199; Fowler v. Western Un. Tel. Co., 80 Me. 381, 387, 15 At. 29, 6 Am. St. Rep. 211; Kiley v. Western Un. Tel. Co., 109 N. Y. 231, 16 N. E. 75 (1888); Western Un. Tel. Co. v.

In a few States, we have a statutory declaration that telegraph and telephone companies are not common carriers.⁶

572. Bailees for Hire. Occasionally the courts of a State have classified these companies as bailees for hire, thus exempting them from the common carrier's liability as insurer,⁷ and also withdrawing them, to some extent, from the category of public service corporations.⁸ In the South Carolina case referred to in the second preceding note, the court said: "Our opinion is that telegraph companies, as to the work which they engage to do, belong to that department known as bailment, especially to that class styled *locatio operis faciendi*, and that they are governed by the principles of law which have been long since established in reference to this department."

573. They Are Public Service Corporations. In all jurisdictions, and without the aid of statutes, the courts have decided, unhesitatingly, that telephone and telegraph companies are public service corporations. They are organized to serve the public; they hold themselves out as servants of the public; they have become important if not indispensable to the community, and, generally,

Griswold, 37 Oh. St. 301, 309, 41 Am. Rep. 500 (1881); Western Un. Tel. Co. v. Neill, 57 Tex. 283, 288, 44 Am. Rep. 589 (1882); Hibbard v. Western Un. Tel. Co., 33 Wis. 558 (1873); Primrose v. Western Un. Tel. Co., 154 U. S. 23, 14 Sup. Ct. 1098, 38 L. Ed. 883 (1893).

6. California Civil Code, § 2168; Montana Civil Code, § 2870.

7. Birney v. New York & Western Un. Tel. Co., 18 Md. 341, 81 Am. Dec. 607 (1862); "This telegraph company is not a common carrier, but a bailee, performing, through its agents a work for its employer, according to certain rules and regulations, which under the law, it has a right to make for its government. The appellee is supposed to know that the engagements of the appellant are controlled by those rules

and regulations, and does himself, in law, engraft them in his contract of bailment and is bound by them." In Western Un. Tel. Co. v. Fontaine, 58 Ga. 433 (1877), it was declared by the court that a telegraph company occupied "the legal status of a bailee for hire and not that of a common carrier." Pinckney Bros. v. Western Un. Tel. Co., 16 S. C. 71, 85, 45 Am. Rep. 765 (1882).

8. In Gillis v. Western Un. Tel. Co., 61 Vt. 461, 464, 17 At. 736, 15 Am. St. Rep. 917 (1889), the court criticised this doctrine, "because telegraph companies are engaged in a business of a public nature, and are precluded by rights and duties incident thereto from occupying the legal status of an ordinary bailee for hire, whose duties arise wholly from the contract of employment."

they have a practical monopoly in their line of business, within each locality.' In the language of Alvey, C. J.: "The appellant (a telephone company) is in the exercise of a public employment, and has assumed the duty of serving the public while in that employment. * * * The telegraph and telephone are important instruments of commerce, and their service as such have become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own and control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railroad company, as a common carrier, can rightfully refuse to perform its duty to the public." ¹⁰

9. *Hockett v. The State*, 105 Ind. 250, 257, 5 N. E. 178, 55 Am. Rep. 201 (1885). "The telephone has become as much a matter of public convenience and of public necessity, as were the stage coach and sailing vessel a hundred years ago, or as the steamboat, the railroad and the telegraph have become in later years": *Central Union Telephone Co. v. Falley*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114 (1888), with valuable note at pp. 128-136; *Fowler v. Western Un. Tel. Co.*, 80 Me. 381, 387, 15 At. 29, 6 Am. St. R. 211, "Telegraph companies are engaged in what may appropriately be called a public employment:" *Turnpike Company v. News Company*, 43 N. J. L. 381 (1881). "The telegraph has become as essential to the transaction of the business of the country as the railroads; and * * * the implication would be very strong that the legislature, in bestowing the franchise, intended to charge the companies with a duty to the public;" *Gardner v. Providence Telephone Co.*, 23 R. I. 262, 268, 49 At. 1004, 55 L. R. A. 113 (1901); *State v. Telephone Co.*, 61 S. C. 83, 94, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R.

A. 139 (1901): "The telephone has become a public servant;" *Gillis v. Telegraph Co.*, 61 Vt. 461, 464, 17 At. 736, 15 Am. St. Rep. 917 (1889); *Telegraph Company v. Telephone Company*, 61 Vt. 241, 249, 17 At. 1071, 15 Am. St. Rep. 893 (1888); *Western Union Tel. Co. v. Reynolds Bros.*, 77 Va. 173, 46 Am. Rep. 715 (1883).

10. *Chesapeake & Pot. Telephone Co. v. Bal. & O. Tel. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167 (1886). In *State ex rel. Webster v. Nebraska Telephone Company*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404 (1885), it is said: "While there is no law giving it a monopoly of the business in the territory covered by its wires, yet it must be apparent to all that the mere fact of this territory being covered by its plant, from the very nature and character of its business gives it a monopoly of the business which it transacts. * * * No statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike who are like situated."

The Supreme Court of Massachusetts ^{10a} has declared that the public nature of the business of these companies "has been recognized by the legislation of Congress, the decisions of the United States courts and of many of the States. So far as known to us, it has not been held otherwise anywhere." ^{10b}

§ 2. THEIR DUTIES TO THE PUBLIC.

574. To Serve All. Inasmuch as these companies are public service corporations, they are charged with certain duties to the public, among which are those of furnishing for a reasonable compensation to any inhabitant of the locality served by them, telegraphic or telephonic service for legitimate purposes, without unfair discrimination, either as to manner of service or rate.¹¹ Their property has been employed by them, voluntarily, in such a manner as to become "affected with a public interest," as that term has been defined by the Supreme Court of the United States; ¹² "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." ¹³

575. In case a telegraph or telephone company refuses, without lawful excuse, to serve any member of the community, or imposes

10a. *Pierce v. Drew*, 136 Mass. 75, 77, 49 Am. Rep. 7 (1883).

10b. For a full discussion of the origin of public service duties, see articles by Professor Charles K. Burdick, in 11 *Columbia Law Review*, 515, 616, 743 (1911).

11. *Nebraska Telephone Co. v. State ex rel. Yeiser*, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113 (1898); *Telegraph Co. v. Telephone Company*, 61 Vt. 241, 17 At. 1071, 15 Am. St. Rep. 893 (1888).

12. *Munn v. Illinois*, 94 U. S. 113, 126, 24 L. Ed. 77 (1876).

13. *Accord. Interocean Pub. Co. v. Associated Press*, 184 Ill. 450, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184 (1900); *Hockett v. The State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201 (1885); *State ex rel. Webster v. Neb. Telephone Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404 (1885); *Nebraska Telephone Co. v. State ex rel. Yeiser*, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113 (1898).

improper conditions upon its performance of services, it renders itself liable to a tort action¹⁴ for this breach of its common law duty,¹⁵ and also to a writ of mandamus or injunction.¹⁶ It is under no legal obligation, however, to render services in aid of unlawful undertakings. Accordingly, it cannot be compelled to install a telephone in a house of ill-fame,¹⁷ or supply telegraphic information to bucket shops or other gambling resorts.¹⁸ It may refuse to transmit messages, or to allow its lines and instruments to be used in transmitting messages which are defamatory or indecent.¹⁹ If the illegality or immorality of a proffered message is fairly doubtful, the doubt should be resolved in favor of the sender by the company, as it would be by a court, in case the company was

See *Telephone Co. v. State*, 98 Miss. 159, 54 So. 670, 39 L. R. A. N. S. 277 (1911), holding the contract in this case valid and not monopolistic.

14. *Cumberland Tel. & Tel. Co. v. Hobart*, 89 Miss. 252, 42 So. 349 (1906), verdict for \$150 was affirmed, although plaintiff's damage was "largely composed of inconvenience and annoyance;" *Gwynn v. Citizens' Telephone Co.*, 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. Rep. 819 (1904). See *Strong v. Western Un. T. Co.*, 18 Idaho, 389, 109 Pac. 910, 30 L. R. A., N. S. 409 (1910).

15. *Supra*, ¶¶ 8, 11, 20 and authorities there cited.

16. *Western Union Tel. Co. v. State ex rel. Hammond Elevator Co.*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. N. S. 153 (1905); *Gwynn v. Citizens' Telephone Co.*, 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870 (1901).

17. *Godwin v. Telephone Company*, 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251, 103 Am. St. Rep. 941 (1904). "It is argued that a common carrier would not be authorized to refuse to convey plaintiff, because she keeps a bawdy house.

Nor is the defendant refusing her a telephone on that ground, but because she wishes to place the telephone in a bawdy house. A common carrier could not be compelled to haul a car for that purpose.

* * * For like reason a mandamus will not lie to compel a water company to furnish water, or a light company to supply light to a house used for carrying on an illegal business. The courts will enjoin or abate, not aid, a public nuisance."

18. *Smith v. Western Un. Tel. Co.*, 84 Ky. 664, 2 S. W. 483 (1887); *Central Stock & Grain Exch. v. Board of Trade*, 196 Ill. 396, 63 N. E. 740 (1902); *Western Union Tel. Co. v. State ex rel. Hammond*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A., N. S. 153 (1905); *Bryant v. Western Un. Tel. Co.*, 17 Fed. 825, and note (1883).

19. *Western Un. Tel. Co. v. Ferguson*, 57 Ind. 495 (1877); *Peterson v. Western Un. Tel. Co.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302 (1896); *Pugh v. City, etc., Tel. Co.*, 25 Al. L. J. 163, 9 Law Bul. 104, 8 Dec. Reprint 644, *affd.* 13 Law Bul. 190, (Ohio 1883).

prosecuted for defamation or other illegal conduct because of its connection with the message.²⁰

These companies are under a duty to treat their patrons decently; and, if they insult and humiliate a patron by abusive language, without lawful excuse, they are liable to him in tort.²¹

576. Must Not Discriminate Unfairly. Engaged as these companies are, of their own volition, in performing a public service, they are bound by the principles of the common law to render services to all patrons on equal terms under like conditions; and not to so discriminate in their rates to their patrons, as to give any one an undue preference over another.²² If they were allowed to give such preferences, they would be able, oftentimes, to secure a monopoly of a particular line of business to a favored patron, or to bring financial ruin upon one discriminated against.²³

These principles, however, do not preclude telegraph and telephone companies from charging different rates to different patrons, provided the differences in the services are fairly commensurate

20. *Gray v. Western Un. Tel. Co., Publishing Co.*, 44 Neb. 326, 62 N. W. 87 Ga. 350, 354, 13 S. E. 562, 14 L. 506, 27 L. R. A. 622 (1895); 58 Neb. R. A. 95, 27 Am. St. Rep. 259 (1891): 192, 78 N. W. 519 (1899); 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765 (1901); *Chesapeake & Pot. Tel. Co. v. Bal. & Oh. Tel. Co.*, 66 Md. 399, 59 Am. Rep. 167 (1886). "The law requires them to be impartial, and to serve all alike;" *Telegraph Co. v. Telephone Company*, 61 Vt. 241, 249, 17 At. 1071, 15 Am. St. Rep. 893 (1889).

21. *State ex rel. Webster v. The Nebraska Telephone Co.*, 17 Neb. 126, 133-4, 22 N. W. 237, 52 Am. Rep. 409 (1885). "It is shown to be essential to the business interests of the relator that his office be furnished with a telephone. The value of such property is, of course, conceded by respondent, but by its attitude it says it will destroy those interests and give to some one in the same business, who may have been more friendly, this advantage

22. *Western Un. Tel. Co. v. Call*

21. *Dunn v. Western Un. Tel. Co.*, 2 Ga. App. 845, 59 S. E. 189 (1907), citing and applying text, *supra*, ¶ 120.

22. *Western Un. Tel. Co. v. Call*

over him."

with the differences in the rates.²⁴ "There is no cast-iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines."²⁵ The patron who complains of ill-treatment by the company, in the respect now under consideration, must show that the discrimination against him has been unjust. In the case last cited, the telegraph company charged the Call Publishing Company five dollars per hundred words, while it charged the State Journal Company (a rival newspaper published in the same city) but one dollar and a half per hundred words, and the action was brought to recover sums which the Call Publishing Company had been thus wrongfully compelled by the telegraph company to overpay. The telegraph company insisted that the difference in the rates charged to the companies was due to the fact that the Call Company received its dispatches during the day, when the services of the telegraph company were more valuable than at night, when the Journal Company received its dispatches. Notwithstanding this defense, however, the jury gave its verdict for plaintiff for \$975. On appeal, the judgment was set aside because "There was no evidence to show that the rate charged the Call Company was unreasonably high; there was no evidence to show that the rate charged the Journal Company was unreasonably low; there was no evidence to show what difference in rates was demanded or justified by exigencies of the difference in conditions of service."²⁶

Upon the second trial, such evidence was given, and a judgment for the plaintiff was affirmed by the Supreme Court of the State,²⁷ and the Supreme Court of the United States.²⁸

577. Statutory provisions are found in many States affirming and extending the common law principles stated above. In Maine, "Every corporation authorized by its charter to grant telephone privileges, including the leasing of instruments and other appliances, shall grant such privileges upon equal and uniform terms

24. Cases in the last two notes. N. W. 506, 27 L. R. A. 622, 48 Am.

25. Brewer, J., in *Western Un. Tel. Co. v. Call Publishing Co.*, 181 U. S. 92, 101, 21 Sup. Ct. 561, 45 L. Ed. 765 (1901). St. Rep. 729 (1895). 27. *Western Un. Tel. Co. v. Call Publishing Co.*, 58 Neb. 192, 78 N. W. 519 (1899).

26. *Western Union Tel. Co. v. The Call Publishing Co.*, 44 Neb. 326, 62 28. *Ibid.* 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765 (1901).

and conditions.”²⁹ Maryland prohibits telephone companies from imposing any conditions or restrictions upon an applicant for telephone connections or facilities that are not imposed impartially upon all persons in like situation, and from discriminating against any individual or company engaged in any lawful business.³⁰ Telegraph companies are required to receive and transmit messages, in accordance with their established rules, and in the order in which they are received, with impartiality and good faith, provided that arrangements may be made with newspapers for the transmission of public intelligence out of its order.³¹ North Dakota affirms the common law duty of telegraph companies,³² and prescribes the following order for the transmission of messages which have accumulated: “1. Messages from public agents of the United States, or of this State, on public business. 2. Messages intended in good faith for immediate publication in newspapers, and not for any secret use. 3. Messages giving information relating to the sickness or death of any person. 4. Other messages in the order in which they were received.”³³

In some States, the rates to be charged by these companies for business within the State's limits have been fixed by statute, or by commissioners who have been authorized by legislation to establish or revise rates.³⁴ When rates have been thus established, they must be observed by the companies, unless they are confiscatory;³⁵ and are not to be evaded by such shifts as were resorted to in the Indiana cases cited in the last note.³⁶

²⁹ Revised Statutes, 1903, ch. 55, § 12. son v. State, 113 Ind. 143, 15 N. E. 215; Nebraska Telephone Co. v. State

³⁰ Public General Laws, Art. 23, § 336; Annotated Code of 1912, Art. 171, 45 L. R. A. 113 (1898). ex rel. Yeiser, 55 Neb. 627, 76 N. W.

³¹ Minn. Rev. Laws, 1905, § 2928 requires these companies to serve all without discrimination and for a reasonable compensation. ³⁵ Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819 (1898); Johnson v. State, 113 Ind. 143, 15 N. E. 215 (1887); Central Un.

³² Public Gen. Laws, Art. 23, § 328. A similar provision is found in Conn.; R S., § 3912. Tel. Co. v. State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114 (1888); Mayo v. Western Un. Tel. Co., 112 N.

³³ Revised Codes, §§ 5671, 5673, 5676, Accord, South Dak. Rev. Code, 1903, Civil Code, §§ 1576, 1577. C. 343, 16 S. E. 1006 (1893). ³⁶ See Leavell v. Western Un. Tel.

³⁴ Revised Codes, § 5699. South Dak. Civil Code, §§ 564, 1604. Co., 116 N. C. 211, 21 S. E. 391, 27 L. R. A. 843, 47 Am. St. Rep. 798 (1895); Wyman on Public Service

³⁵ Hockett v. The State, 105 Ind. 250, 55 Am. Rep. 201 (1885); John- Corporations, chap. XLI.

§ 3. THEIR RIGHTS.

578. To Reasonable Compensation. Telegraph and telephone companies are entitled to a reasonable compensation for their services. If they demand an unreasonable price, the patron is entitled to relief, either by bringing his grievance before a State Board of Commissioners or similar body, where he may have a reasonable rate fixed;³⁷ or by an action for a penalty when that is imposed by statute;³⁸ or by an action for damages when he has been compelled to pay an unreasonable rate;³⁹ or by a writ of mandamus compelling the company to serve him for a fair rate, or of injunction prohibiting the withdrawal of such service.⁴⁰

From the foregoing authorities and the principles stated in the preceding sections, it is apparent that the State has the power to determine what rate is reasonable for service rendered or offered by one of these companies, in its quasi-public capacity. It has not such power, however, to prescribe what a company shall charge for services rendered in a department of its business which is of a purely private nature.⁴¹ Moreover, if a State Legislature or Board fixes a rate for these quasi-public services which is so low as to deprive a company of the beneficial use of its property, such rate will be annulled by the courts.⁴² The State may require

37. *Nebraska Telephone Co. v. State* 881, 46 L. Ed. 1144 (1902). *Brewer, ex rel. Yeiser*, 55 Neb. 627, 76 N. W. J., said: "It appears that some portion of the defendant's business is of

38. Conn. Gen. Statutes, §§ 3912, a purely private nature, the receipts 3913; *Florida*, L. 1907, ch. 5628 (No. whereof are spoken of in its reports 33), § 1; *Western Un. Tel. Co. v. as private rentals, and as to such Pendleton*, 95 Ind. 12, 48 Am. Rep. business congress could not, if it 692 (1883). would, prescribe what shall be charged

39. *Western Un. Tel. Co. v. Call therefor."*
Publishing Co., 58 Neb. 192, 78 N. W. **42.** *Western Un. Tel. Co. v. Myatt*, 519 (1899), *affd.* 181 U. S. 92, 21 89 Fed. 335 (1899): The court de-

40. *N. Y. & C. Grain & S. Exch. v. duced in this cause show prima facie Board of Trade*, 127 Ill. 153, 19 N. that the maximum rates for tele- E. 855, 2 L. R. A. 411 (1889); *Gwynn graphic service prescribed by chapter v. Citizens' Tel. Co.*, 61 S. C. 83, 39 38 of the laws enacted by the legisla- S. E. 257, 55 L. R. A. 139, 85 Am. ture of the state of Kansas at the St. Rep. 870 (1901). special session of 1898 are less than

41. *Chesapeake & P. Tel. Co. v. the cost of performing the service, Manning*, 186 U. S. 238, 22 Sup. Ct. and are, therefore, unreasonable

public service companies to operate during reasonable hours, on every day of the week, as a condition of exercising their franchise.^{42a}

Not only is a telegraph or telephone company entitled to reasonable compensation for its services, but it has a right to demand payment in advance,⁴³ including a deposit for an answer, which is requested.⁴⁴ This right to prepayment may be waived.⁴⁵

579. To Establish Proper Regulations. In common with all who are engaged in like quasi-public callings, these companies have the right to make and enforce reasonable regulations for the conduct of their business.⁴⁶ Whether particular regulations are reasonable is a question for judicial decision.⁴⁷ Even regulations which are generally fair, may become oppressive and unreasonable in special circumstances, and these companies "must exercise ordinarily prudent discretion in relaxing their regulations in such cases."⁴⁸

and confiscatory; and that the enforcement of such rates, which is threatened, would operate to deprive the telegraph company of its property without due process of law. and would be a denial of the equal protection of the laws;" *Pioneer T. & T. Co. v. Westenhaven*, 29 Okla. 429, 118 Pac. 354, 38 L. R. A. N. S. 1209 (1911), and authorities cited in the opinion and note.

42a. *Twin Valley T. Co. v. Mitchell*, 27 Okla. 388, 113 Pac. 914, 38 L. R. A. N. S. 235 (1910).

43. *Langley v. West. Un. Tel. Co.*, 88 Ga. 777, 15 S. E. 291 (1892); *West. Un. Tel. Co. v. Power*, 93 Ga. 543, 21 S. E. 51 (1893); *Western Un. Tel. Co. v. Mossler*, 95 Ind. 29 (1883).

44. *West. Un. Tel. Co. v. McGuire*, 104 Ind. 130, 2 N. E. 201 (1885); *Hewlett v. West. Un. Tel. Co.*, 28 Fed. 181 (1886).

45. *West. Un. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 So. 579 (1893).

46. *Birney v. N. Y. etc. Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607 (1862);

Pittsburg, etc. Ry. v. Lyon, 123 Pa. 140, 16 At. 607, 2 L. R. A. 489, 10 Am. St. R. 517 (1888); *West. Un. Tel. Co. v. Reynold Bros.*, 77 Va. 173, 184, 46 Am. Rep. 715 (1883).

47. *West. Un. Tel. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963 (1900); *True v. Intern. Tel. Co.*, 60 Me. 9, 18, 11 Am. Rep. 156 (1872); *Smith v. Gold, etc. Tel. Co.*, 42 Hun (N. Y.) 454 (1886); *West. Un. Tel. Co. v. Griswold*, 37 Oh. St. 300, 313, 41 Am. Rep. 500 (1881), "if they fail to accord with sound public policy they are void;" *Gillis v. West. Un. Tel. Co.*, 61 Vt. 461, 17 At. 736, 15 Am. Rep. 917 (1889); *Heimann v. West. Un. Tel. Co.*, 57 Wis. 562 (1883); *West. Un. Tel. Co. v. Reynolds Bros.*, 77 Va. 173, 184, 46 Am. Rep. 715 (1883). "This reasonableness will be dependent upon the circumstances of the case and the rulings of the court applying the law to the facts."

48. *Hewlett v. West. Un. Tel. Co.*, 28 Fed. 181, 184 (1886); *Conrad v. West. Un. Tel. Co.*, 162 Pa. 204, 29

Some of the more important regulations are those fixing the business hours of a company's various offices,⁴⁹ prescribing the form in which messages must be presented for transmission, and the time within which claims for damages must be made.⁵⁰

580. To Contract for Exemption from Common Law Liability. All courts are agreed that these companies may limit the measure of their responsibility to a reasonable extent by contracts fairly entered into with their patrons.⁵¹ What limitations and exemptions are reasonable is a question upon which courts are at variance, as, we have seen in a former connection, they are with regard to attempted contract exemptions of common carriers.⁵² This difference of opinion is due principally to the varying conceptions of public policy held by different courts.

The standard form, provided by telegraph companies for messages, contains a clause to the effect that "it is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmis-

At. 888 (1894). The regulation that claims for damages must be presented within six days is ordinarily reasonable, but is unreasonable at times, as in this case, and then will not be enforced.

49. Sweet v. Postal Tel. Co., 22 R. I. 344, 47 At. 881, 53 L. R. A. 732 (1901); West. Un. Tel. Co. v. Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847 (1894).

50. Young v. West. Un. Tel. Co., 65 N. Y. 163 (1875); Wolf v. West. Un. Tel. Co., 62 Pa. 82, 1 Am. Rep. 387 (1869); Conrad v. West. Un. Tel. Co., 162 Pa. 204, 29 At. 888 (1894). In the last case, the message was sent from Philadelphia to China and did not call for a reply by wire, but the reply, in the ordinary course of business would be by letter with bill of lading. "From the nature of the message, the distance between him who sent and those to whom it was sent, the neglect of the defendant was

not known and could not in the ordinary course of business have been known, until after the expiration of the sixty days." Hence the rule of the company, requiring claims to be presented within sixty days, was held unfair and unenforceable against this plaintiff.

51. Harkness v. West. Un. Tel. Co., 73 Ia. 190, 193, 34 N. W. 811, 5 Am. St. Rep. 672 (1887); Primrose v. West. Un. Tel. Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883 (1893). "By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays;" Camp v. West. Un. Tel. Co., 1 Met. (58 Ky.) 164 (1858).

52. Surpa, Chap. III, § 8.

sion or delivery, or non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." Some courts have declared that this stipulation does not violate any sound public policy. They say: "To guard against error from causes to which this mode of conveying intelligence is peculiarly exposed, it is deemed but a reasonable and fair precaution to secure entire correctness that the message should be returned, so that it will be certainly known it has been correctly carried to the person to whom it is addressed, with the added compensation for its transmission both ways." ⁵³

581. Other courts treat such a stipulation as "contrary to public policy and void." They hold that the customer and the telegraph company do not stand upon an equality in entering into such a contract. "The public is compelled to accept the services of the telegraph company and to rely upon its discharging its duty. In this and other respects, the employments of the telegraph company and the common carrier of goods are strongly analogous. The business in which each is engaged is almost equally important to the public; vast interests are committed to each, and good faith and diligence in the discharge of the duties of each are essential to the interest of the public. In both cases the demands of a sound public policy alike forbid any stipulations to relieve them of the duty to use the care and diligence resting upon them. To hold otherwise would be to give license and immunity to carelessness and negligence on the part of each, and would be disastrous to the interests of the public." ⁵⁴

53. *Lassiter v. West. Un. Tel. Co.*, said: "So far from that being as 89 N. C. 334 (1883). *Accord*, *Redmy brother Byles suggests, an unreasonable qualification or limitation of path v. West. Un. Tel. Co.*, 112 Mass. 71, 17 Am. Rep. 69 (1873); *Breese the company's liability, it seems to me to be perfectly just and reasonable v. U. S. Tel. Co.*, 48 N. Y. 132, 8 Am. Rep. 526 (1871); *Pearsall v. West. that means should be afforded to the Un. Tel. Co.*, 124 N. Y. 256, 26 N. E. company of ascertaining, by repetition, the correctness of the translation 534, 21 Am. St. Rep. 662 (1891); *tion, the correctness of the translation West. Un. Tel. Co. v. Stevenson*, 128 of the messages delivered to them for Pa. 442, 18 At. 441, 15 Am. St. Rep. transmission." 687 (1889); *McAndrew v. Elec. Tel. 54. West. Un. Tel. Co. v. Short*, 53 Co., 17 C. B. 3, 84 Eng. Com. L. 3 Ark. 434, 440, 14 S. W. 649 (1890). (1855). In the last case, *Jervis, C. J., Accord, West. Un. Tel. Co. v. Man-*

The latter view, that these companies cannot exempt themselves by contract from liability for their negligence, including the negligence of their servants, has been embodied in the statutes of several States.⁵⁵

582. Contracting for Exemption from Gross Negligence. There is substantial unanimity that a telegraph company cannot exempt itself from liability for gross negligence, either on the part of its managers, or of its servants;⁵⁶ as it cannot from liability for wilful misconduct.⁵⁷ While some judges have professed to find difficulty in defining gross negligence,⁵⁸ the term is generally employed to designate the absence of even slight care, in the circumstances of the particular case.⁵⁹

chard, 69 Ga. 299, 45 Am. Rep. 480 (1882). "Any rule of the company which seeks to relieve it from performing the duty belonging to its employment with integrity, skill and diligence, contravenes public policy, as well as the law, and under it the party at fault cannot seek refuge;" Tyler v. West. Un. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38 (1871); West. Un. Tel. Co. v. Griswold, 37 Oh. St. 301, 41 Am. Rep. 500 (1881); Thompson v. Un. Tel. Co., 64 Wis. 531, 54 Am. Rep. 644 (1885).

55. Fla. L. 1907, ch. 5628 (No. 33), § 1; Iowa Code, 1897, Tit. X, ch. 8, § 2163; Kentucky Constitution, § 196, construed in West. Un. Tel. Co. v. Eubanks, 100 Ky. 593, 38 S. W. 1068 (1897) overruling Camp v. West. Un. Tel. Co., 1 Met. (58 Ky.) 164 (1858); Michigan Compiled Laws, 1897, § 5268; Minnesota Rev. Laws, 1905, § 2928; Nebraska, Annotated Statutes, 1903, § 1146; West. Un. Tel. Co. v. Beals, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682 (1898).

56. West. Un. Tel. Co. v. Crall, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795; Redpath v. West. Un. Tel. Co., 112 Mass. 71, 17 Am. Rep. 69 (1873);

Grinnell v. West. Un. Tel. Co., 113 Mass. 299, 302, 18 Am. Rep. 485 (1873); West. Un. Tel. Co. v. Goodbar (Miss.), 7 So. 214 (1890); Will v. Postal Tel. Co., 3 App. Div. 22, 37 N. Y. Supp. 933 (1896); Altman v. West. Un. Tel. Co., 84 N. Y. Supp. 54 (1903), the negligence in this case held not to be gross; Pegram v. West. Un. Tel. Co., 97 N. C. 57, 2 S. E. 256 (1887); Jones v. West. Un. Tel. Co., 18 Fed. 717 (1883).

57. Hart v. West. Un. Tel. Co., 66 Cal. 579, 583, 56 Am. Rep. 119 (1885); U. S. Tel. Co. v. Gildersleeve, 29 Md. 232, 248, 96 Am. Dec. 519 (1868); West. Un. Tel. Co. v. Neill, 57 Tex. 283, 291, 44 Am. Rep. 589 (1882); Womack v. West. Un. Tel. Co., 58 Tex. 176, 179, 44 Am. Rep. 614 (1882).

58. Pearsall v. West. Un. Tel. Co., 124 N. Y. 256, 266, 26 N. E. 534, 21 Am. St. Rep. 662 (1891); West. Un. Tel. Co. v. Griswold, 37 Oh. St. 301, and cases cited pp. 311-12, 41 Am. Rep. 500 (1881).

59. Cases cited supra, ¶ 515; West. Un. Tel. Co. v. Howell, 38 Kan. 685, 17 Pac. 313 (1888).

§ 4. TORT ACTIONS BY SENDER OF TELEGRAM.

583. Sender's Option to Sue in Contract or in Tort. As a rule, the sender enters into a contract with the telegraph company for the transmission of his telegram. If the company breaks this contract to the damage of the sender, is the latter limited to an action upon contract, or may he sue in tort, if he prefers that form of action?

It would seem upon principle that he has the option. As the company is engaged in a quasi-public employment, it is clearly under a common law duty, as well as under a contract obligation, to transmit the message with due care, skill and promptness. For a breach of such duty the company should be liable in tort;⁶⁰ and the weight of American authority is in favor of such liability even to the sender.⁶¹ Of course, it may secure exemption from

60. *Supra*, ¶¶ 11, 13, 20; *Brether-ton v. Wood*, 3 *Brod. & Bing.* 54 (1821), distinguishing *Max v. Roberts*, 12 *East* 89 (1810), as a case where the defendants "had no duty cast on them but what arose by contract." In *Brown v. Boorman*, 11 *Cl. & F.* 1, 44 (1844); Lord Campbell declared: "Whenever there is a contract, and something to be done in the course of that employment, the plaintiff may either recover in contract or in tort." In *Rich v. N. Y. Cent. & H. R. R. Ry.*, 87 *N. Y.* 382, 395 (1882), Judge Finch, writing for the court, said: "Unless the contract creates a relation, out of which springs a duty, independent of the mere contract obligation, though there may be a breach of contract, there is no tort, since there is no duty to be violated. And the illustration given is the common case of a contract of affreightment, when beyond the contract obligation to transport and deliver safely, there is a duty, born of the relation to do the same thing."

61. *Garrett v. West. Un. Tel. Co.*, 83 *Ia.* 257, 49 *N. W.* 83 (1891); *Hendershott v. West. Un. Tel. Co.*, 106 *Ia.* 529, 76 *N. W.* 828, 68 *Am. St. Rep.* 313 (1898); *Cowan v. West. Un. Tel. Co.*, 122 *Ia.* 379, 98 *N. W.* 281, 64 *L. R. A.* 545, 101 *Am. St. Rep.* 268 (1904); *Smith v. West. Un. Tel. Co.*, 83 *Ky.* 104, 113, 4 *Am. St. Rep.* 126 (1885); *Birkett v. West. Un. Tel. Co.*, 103 *Mich.* 361, 61 *N. W.* 645, 33 *L. R. A.* 404, 50 *Am. St. Rep.* 374 (1894); *Shinglend v. West. Un. Tel. Co.*, 72 *Miss.* 1030, 1035, 18 *So.* 425, 48 *Am. St. Rep.* 604, 30 *L. R. A.* 444 (1895); *Alexander v. West. Un. Tel. Co.*, 66 *Miss.* 161, 175, 5 *So.* 397, 3 *L. R. A.* 71, 14 *Am. St. Rep.* 556 (1888), sender may sue in tort because the law imposes upon the company the duty of serving the public without negligence or unreasonable delay; *West. Un. Tel. Co. v. Cook*, 54 *Neb.* 109, 74 *N. W.* 395 (1898); *Baldwin v. U. S. Tel. Co.*, 45 *N. Y.* 744, 748, 6 *Am. Rep.* 175 (1871); *West. Un. Tel. Co. v. Morris*, 83 *Fed.* 992, 28 *C. C. A.* 46, 55 *U. S. App.* 211 (1897). In the following cases the sender sued on contract: *Corland v. West. Un. Tel. Co.*, 118 *Mich.* 369, 76 *N. W.* 762,

such liability by a valid contract with the sender therefor.⁶² Whether a particular agreement for exemption is a valid contract depends upon principles, discussed in the preceding sections.

584. The view taken by the courts, which limit the plaintiff to a contract action against a telegraph company, is fairly represented in the following extract: "This action is not in tort, but on contract: its gist and grievance being the breach of the contract, the duties and obligations growing out of which are regulated by the statute, which itself becomes a part of it. The best test of this is the fact that such action could not be maintained without pleading and proving the contract."⁶³

An action for a statutory penalty, whether by the sender or the addressee of the message, is one in tort, according to the prevailing view.⁶⁴

§ 5. TORT ACTION BY SENDEE OF TELEGRAM.

585. **None in England.** The person to whom a telegram is sent has no action of any kind against the company in England, when he is a stranger to the transaction between the sender and the company,⁶⁵ and when there is no wilful alteration or misstatement by the company which can furnish ground for an action in

43 L. R. A. 280, 74 Am. St. Rep. 394 (1898); Kemp v. West. Un. Tel. Co., 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363 (1890); West. Un. Tel. Co. v. Wilhelm, 48 Neb. 410, 67 N. W. 870 (1896); Gillis v. West. Un. Tel. Co., 61 Vt. 461, 17 At. 736, 15 Am. St. Rep. 917 (1889). Among later cases to the same effect are: West. Un. Tel. Co. v. Ford, 8 Ga. App. 514, 70 S. E. 65 (1911); Same case, 10 Ga. App. 606, 74 S. E. 70 (1912); Glawson v. So. Bell Tel. Co., 9 Ga. App. 455, 71 S. E. 74 (1911); Strong v. West. Un. Tel. Co., 18 Idaho, 389, 109 Pac. 910 (1910); Joshua L. Bailey & Co. v. West. Un. Tel. Co., 227 Pa. 522, 76 At. 736 (1910).

⁶² Shaw v. Cable Company, 79 Miss. 670, 31 So. 222, 56 L. R. A. 486,

89 Am. St. Rep. 666 (1901); Kiley v. West. Un. Tel. Co., 109 N. Y. 231, 16 N. E. 75 (1888).

⁶³ Francis v. West. Un. Tel. Co., 58 Minn. 252, 261, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507 (1894); Accord, Olympe de La Grange v. South Western Tel. Co., 25 La. Ann. 383 (1873).

⁶⁴ Balt. & Oh. Tel. Co. v. Lovejoy, 48 Ark. 301, 3 S. W. 183 (1886); West. Un. Tel. Co. v. Merediths, 95 Ind. 93 (1883).

⁶⁵ Dickson v. Reuter's Tel. Co., 3 C. P. D. 1, 47 L. J. C. P. 1 (1877), affg. S. C. 2 C. P. D. 62 (1877), and following Playford v. U. K. El. Tel. Co., L. R. 4 Q. B. 706, 38 L. J. Q. B. 249 (1869).

deceit.⁶⁶ As "inland communication by telegraph is now in the hands of the Postmaster General,"⁶⁷ who is not subject to suit, for the reasons stated on a former page,⁶⁸ the judicial consideration of this topic by the House of Lords can be obtained only in actions growing out of foreign telegrams, and none of that character have come before that august tribunal.

586. When Sendee Is Principal. In case the sender of the message is but the agent of the sendee in the particular transaction, the latter's rights to sue the company either for breach of contract or for tort are the same as though he were the nominal sender.⁶⁹ This is true, whether his position as principal was disclosed at the time of making the contract for sending the message⁷⁰ or was undisclosed.⁷¹ In the latter event, it is true, the principal would be subject to any defense which was available against the agent when the disclosure of the principal was made to the company,⁷² and would be bound by any stipulation of the agent limiting the company's liability which are binding upon the agent.⁷³

66. *Blakeney v. Pegus*, (No. 2), 6 N. S. W. 223 (1885). Defendant a "telegraph mistress," mistakenly but in good faith sent a telegraphic message to plaintiff, which was intended for another, and which caused plaintiff to incur considerable expense, before the mistake was corrected. The damage was held not actionable, as there was no evidence of intentional falsity on the part of the defendant, and the relation between a telegraph company and its patrons is solely that of contract.

67. *Pollock on Torts* (8th Ed.) 553.

68. *Supra*, ch. 3, § 4, ¶ 43.

69. *Milliken v. West. Un. Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281 (1888).

70. *Dougherty v. Am. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435 (1883); *West. Un. Tel. Co. v. Wilson*, 92 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23 (1890).

71. *West v. West. Un. Tel. Co.*, 39 Kan. 93, 17 Pac. 807 (1888); *Young*

v. West. Un. Tel. Co., 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883 (1890). "Upon authority and reason, we think it clear that the plaintiff could maintain the action; and whether it is an action *ex contractu*, for breach of the contract for speedy and safe transmission, or *ex delicto* for negligence and violation of the duty which the defendant owed as a public corporation, or as a common agent of sender and receiver, at least nominal damages could be recovered;" *Thompson v. West. Un. Tel. Co.*, 107 N. C. 449, 12 S. E. 427 (1890); *West. Un. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843 (1889). But see *West. Un. Tel. Co. v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. N. S. 678 (1905).

72. *Harkness v. West. Un. Tel. Co.*, 73 Ia. 190, 34 N. W. 811, 5 Am. St. Rep. 672 (1887).

73. *Coit v. West. Un. Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153 (1900).

587. When a Sendee Is a Stranger to the Contract for Transmission. In England, as we have seen, such a sendee cannot maintain an action against the company for negligent misconduct respecting the message which injures him. Not on contract, for he is not a party to any contract with the company, and, in that country, he gains no contract rights by showing that the contract in question was intended for his benefit, when he is not the principal of the sender.⁷⁴ Nor can the action be brought in tort, for the company is under no legal duty to the sendee to transmit and deliver the message to him at all, much less to do it with care, skill and promptness.⁷⁵

588. In this country, the sendee who has sustained damage which is the proximate result of the company's negligence, can maintain an action against the company; although the ground of such action has been variously described by our courts. In a North Carolina case,⁷⁶ the reasons for sustaining such actions are summarized as follows: "1. That a telegraph company is a public agency and responsible as such to anyone injured by its negligence; or, at least, it is the common agent⁷⁷ of sender and receiver, and responsible to each for any injury sustained by them, respectively, by its negligence. 2. That when the receiver is the beneficiary of the contract, the injury, if any, caused by the company's negligence, must be to him.⁷⁸ 3. The message is the property of the party addressed in analogy to a consignee of goods."

74. *Playford v. U. K. Tel. Co.*, L. R. 4 Q. B. 706, 10 B. & S. 759, 38 L. J. Q. B. 249 (1869). unless that misrepresentation is fraudulent or careless. But it is never laid down that the exemption

75. *Dickson v. Reuter's Tel. Co.*, 3 C. P. D. 1, 6, 47 L. J. C. P. 1 (1877). from liability for an innocent misrepresentation is taken away by carelessness. It seems to me, therefore, that that point also fails the plaintiff." Bramwell, L. J. said: "That duty to take care can only arise in one of two ways, namely, either by contract or

by the law imposing it. * * * Does that duty arise by law? If it did, the consequence would be that the general

76. *Young v. West. Un. Tel. Co.*, 107 N. C. 370, 372, 11 S. E. 1044, 22 Am. St. Rep. 883 (1890).

rule which has been admitted to exist is inaccurate, and that it ought to be laid down in these terms, that no action will lie against a man for a misrepresentation of facts whereby damage has been occasioned to another,

77. *N. Y. & W. Printing Tel. Co. v. Dryburg*, 35 Pa. 298, 303, 78 Am. Dec. 338 (1860).

78. *Wadsworth v. West. Un. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. Se. Rep. 864 (1888).

589. **The prevailing theory**, upon which these actions are supported, is that suggested in the first clause of the foregoing quotation: that a telegraph company is engaged in a quasi-public calling, and, by reason thereof, comes under a common law duty, not only towards those sending dispatches, but also towards those to whom they are sent. This common law duty it violates when it negligently fails to correctly transmit and to promptly deliver a message which it has duly received for transmission.⁷⁹ As said by the Illinois court in the case cited in the last note: "Telegraph companies are the servants of the public, and bound to act whenever called upon, their charges being paid or tendered. They are, in that respect, like common carriers, the law imposing upon them a duty which they are bound to discharge. The extent of their liability is to transmit correctly the message as delivered. Hence, when the receiver of a dispatch suffers loss from the careless and negligent performance of its duty by such a company, he is entitled to recover damages for the tort, and the proper remedy is an action on the case."

590. **Sendee Not Bound by Company's Arrangement with Sender.** In jurisdictions where the theory just stated obtains, the stranger sendee is not affected by stipulations imposed by the company on the sender. The latter has no authority to bind the sendee by such stipulations; and the sendee brings his action in tort for the company's violation of its legal duty to him.⁸⁰

79. *Coit v. West. Un. Tel. Co.*, 130 Cal. 657, 663, 63 Pac. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153 (1900); *Western Un. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109 (1889); *West. Un. Tel. Co. v. Tenton*, 52 Ind. 1, 4 (1875); *Mentzer v. West. Un. Tel. Co.*, 93 Ia. 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294 (1895); *Alexander v. West. Un. Tel. Co.*, 66 Miss. 161, 5 So. 397, 3 L. R. A. 71, 14 Am. St. Rep. 556 (1888); *Teleg. & Cable Co. v. Wells*, 82 Miss. 733, 739, 35 So. 190 (1904); *Walker v. West. Un. Tel. Co.*, 75 S. C. 512, 56 S. E. 38 (1906); *Ferrero v. West. Un. Tel. Co.*, 9 D. C. App. 455, 467, 35 L. R. A. 548 (1896).

80. *McCord v. West. Un. Tel. Co.*, 39 Minn. 181, 183, 39 N. W. 315, 12 Am. St. Rep. 638 (1888); "As respects the receiver of the message, it is entirely immaterial upon what terms or consideration the telegraph company undertook to send the message. It is enough that the message was sent over the line, and received in due course by plaintiff, and acted on by him in good faith;" *Elsley v. Postal Tel. Co.*, 20 N. Y. State Rep. 97 (1888); *Halsted v. Postal Tel. Co.*, 120 App. Div. 433, 440, 104 N. Y. Supp. 1016 (1907). "Telegraph companies being under a public duty (i. e., a duty arising out of the public service which they are licensed or in-

This view seems clearly right, and yet some courts have repudiated it. According to their reasoning, the telegraph company comes under a legal duty to the sendee of a message only because it has entered into a contract with the sender to transmit and deliver it. Hence, that duty must be measured by the terms of that contract.⁸¹ "It is difficult to see," said the Massachusetts court, in the case cited in the last note, "how the plaintiff, who claims through the contract entered into by the sender of the message with the defendants, which created the duty and obligation resting on the defendants, can claim any higher or different degree of diligence than that which was stipulated for by the parties to the contract. Certainly a derivative or incidental right cannot be greater or more extensive than that which attached to the principal or source, whence such right accrued or was derived."

591. The vice of this reasoning, it is submitted, consists in the assumption that the company's duty to the sendee of a message has its source in the contract between the company and the sender; when, in fact, its source is in the public service character of the company. Undoubtedly, the company's opportunity to injure the sendee is found in the contract relation which subsists between it

incorporated by government to perform) to receivers of messages, senders of messages cannot by contract lessen or do away with that duty. They may only do so in respect of the duty due to themselves"—dissenting opinion of Gaynor and Hooker, JJ.; this view was rejected by the majority of this court and by the Court of Appeals, 193 N. Y. 293, 85 N. E. 1078, 19 L. R. A. N. S. 1021, 127 Am. St. R. 952 (1908); N. Y. & Wash. P. Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338 (1860); "He (the receiver) did not know whether the message had been repeated back to Le Roy (the sender) or not." Tobin v. West. Un. Tel. Co., 146 Pa. 375, 23 At. 324, 28 Am. St. Rep. 802 (1891); Joshua L. Bailey & Co. v. West. Un. Tel. Co., 227 Pa. 522, 76 At. 736 (1910). See Union Construction Co. v. West. Un. Tel. Co., 168 Cal. 298, 125 Pac. 242 (1912), limiting earlier California cases.

81. Ellis v. Am. Tel. Co., 95 Mass. (13 Allen) 226, 238 (1886); Halsted v. Postal Tel. Co., 120 App. Div. 433, 436, 104 N. Y. Supp. 1016 (1907), prevailing opinion; 193 N. Y. 293, 85 N. E. 1078, 19 L. R. A. N. S. 1021, 127 Am. St. R. 952 (1908). In both of these cases the sender had assented to a stipulation in the message blank that, if the message was not repeated back, and one-half rates paid therefor, the company should not be liable for mistakes in the transmission, and the messages had not been repeated. Accord, M. M. Stone & Co. v. Postal Tel. Co., 31 R. I. 174, 76 At. 762, 29 L. R. A. N. S. 195 (1910).

and the sender. But the injury inflicted upon the sendee, by delivering to him a message that was never sent, or by failing to deliver one that was sent, is not a mere incident of the contract between the sender and the company; and the sendee's right to redress is not derivative from such contract.

A common carrier receives goods for transportation, under a contract that it shall not be liable therefor to the shipper beyond the sum of fifty dollars. The shipper gives due notice to the carrier to stop the goods in transit. Through the carrier's negligence in complying with this order of stoppage, they are lost. The shipper, it has been held, and, it is submitted, properly held, can recover the value of the goods, notwithstanding the stipulation in the transportation contract. The action is founded on the neglect of the carrier's common law duty, not on its contract of carriage.⁸² Certainly, the sendee of a message is quite as free from the contract stipulations of the sender, who is neither his agent or principal, as the unpaid vender of goods is from his own contract stipulations in the character of shipper.

592. Delay in Delivering Message. The services of a telegraph company are sought by its patrons because of the celerity with which messages can be transmitted. It is of the very essence of the company's undertaking that there shall be no unreasonable delay in sending and delivering messages which it has duly received.⁸³ Whether the time between the reception and delivery of a particular message amounts to unreasonable delay is generally a question of fact determinable from all of the circumstances of the case.⁸⁴ As a rule, the delay is not unreasonable when the message

82. *Rosenthal v. Weir*, 54 App. Div. 275 (1900); *affd.* 170 N. Y. 148, 63 N. E. 65; 23 L. R. A. 239 (1902)).

83. *West. Un. Tel. Co. v. Henderson*, 89 Ala. 510, 516, 7 So. 419, 18 Am. St. Rep. 148 (1889); *Hendricks v. West. Un. Tel. Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658 (1900); *Blackwell M. & E. Co. v. West. Un. Tel. Co.*, 17 Okl. 376, 89 Pac. 234 (1907).

84. *Sherrill v. West. Un. Tel. Co.*, 116 N. C. 655, 21 S. E. 429 (1895);

s. c., 117 N. C. 352, 23 S. E. 277 (1896). In this case there was evidence of diligent inquiry by the company for the sendee's residence. *West. Un. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843 (1889); delay held unreasonable because of the peculiar circumstances of the case. "Having received the plaintiff's money, knowing his object in sending the message, and that the object could only be obtained by prompt trans-

is promptly delivered during the ordinary business hours of the terminal office; although the message may have been received at such office some time before the opening of business hours.⁸⁵ If the office is open for business and messenger boys are present, when the dispatch is received, the fact that it was not within office hours will not avail the company for delay in delivering the message.⁸⁶

593. Non-Delivery of Message. Telegraph companies ordinarily stipulate that "messages will be delivered free within the established free-delivery limits of the terminal office; for delivery at a greater distance, a special charge will be made to cover the cost of such delivery." This stipulation has generally been accounted a reasonable one; and if the non-delivery is due to the fact that the sendee resides outside the free-delivery limits, the company is not liable.⁸⁷ Nor is the company liable for the non-delivery of a message, where such failure to deliver is not due to its negligence;⁸⁸

mission and delivery to the person addressed, it could not legally urge its rules as to office hours as an excuse for not delivering the dispatch until the next day." See *West. Un. Tel. Co. v. Neel*, 86 Tex. 368, 371, 25 S. W. 15, 40 Am. St. Rep. 847 (1894).

85. *West. Un. Tel. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172 (1885); *West. Un. Tel. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847 (1894); *Davis v. West. Un. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026 (1899); *Bonner v. West. Un. Tel. Co.*, 71 S. C. 303, 51 S. E. 117 (1904). In *Union Construction Co. v. West. Un. Tel. Co.*, 163 Cal. 298, 125 Pac. 242 (1912), the delay was held to be unreasonable.

86. *Bright v. West. Un. Tel. Co.*, 132 N. C. 317, 325, 43 S. E. 841 (1903).

87. *West. Un. Tel. Co. v. Henderson*, 89 Ala. 510, 518, 7 So. 419, 18 Am. St. Rep. 148 (1889); "Free delivery is a conditional obligation,

contingent on the sendee's residence being within the area of free delivery; and until that condition is shown the telegraph company is not put in default;" *Hendricks v. West. Un. Tel. Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658 (1900); *West. Un. Tel. Co. v. Mathews*, 107 Ky. 663, 55 S. W. 427 (1900); *West. Un. Tel. Co. v. Cross*, 116 Ky. 5, 74 S. W. 1098 (1903); *West. Un. Tel. Co. v. Jennings*, 98 Tex. 465, 84 S. W. 1056 (1905). The rule of the company fixed the limits of the free delivery district as within the radius of half a mile from the office, held that this meant one-half mile in a straight line and not by the road.

88. *Thomas v. West Un. Tel. Co.*, 120 Ky. 194, 85 S. W. 760 (1905); *West. Un. Tel. Co. v. Cross*, 116 Ky. 5, 74 S. W. 1098 (1903); *Reynolds v. West. Un. Tel. Co.*, 81 Mo. App. 223 (1899); *West. Un. Tel. Co. v. Swearingen*, 95 Tex. 420, 67 S. W. 1080 (1902).

much less, when it is due to the conduct of the plaintiff,⁸⁹ or of one for whose conduct he is chargeable.⁹⁰

"Ordinarily, the measure of the duty of the telegraph company in respect to delivery is a diligent effort to deliver a message at the place to which it is sent, and within the free-delivery limits of the place, if such limits exist. Usually the failure to prepay or to arrange for delivery beyond the free-delivery limits will excuse non-delivery outside those limits."⁹¹

A more stringent rule is applied in some States, under statutes which declare that "a carrier of messages by telegraph must use the utmost diligence therein."⁹²

Negligence on the part of the company will be presumed, or to put it in another way, a prima facie case of negligence is established when it is shown that a different message is delivered from that which was sent,⁹³ or when unreasonable delay in delivery appears,⁹⁴ or when the message is not delivered at all.⁹⁵

89. *Gainey v. West. Un. Tel. Co.*, 136 N. C. 261, 48 S. E. 653 (1904). The message was directed to "G. (Po. O. Idaho), Fayetteville, N. C." and called for an answer by mail. The court held that the company was justified in sending the dispatch to Idaho by mail from Fayetteville.

90. *Hinson v. Postal Tel. Cable Co.*, 132 N. C. 460, 43 S. E. 945 (1903). "The negligence of a person in whose care a telegram is sent will be imputed to the sendee and not to the telegraph company."

91. *West. Un. Tel. Co. v. Harvey*, 67 Kan. 729, 731, 74 Pac. 250 (1903). *Accord.* *Dodd Grocery Co. v. Postal Tel. Co.*, 112 Ga. 685, 37 S. E. 981 (1900); *Hurlburt v. West. Un. Tel. Co.*, 123 Ia. 295, 98 N. W. 794 (1904); *Thomas v. West. Un. Tel. Co.*, 120 Ky. 194, 85 S. W. 760 (1905); *Green v. West. Un. Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985 (1904). "Negligence in the transmission of a telegram is shown by the making of such a change in the name of

the sendee that a person answering to the substituted name cannot be found"—*Mrs. Knoble* changed to *Mrs. Jno. E. Lee*. In *West. Un. Tel. Co. v. Whitson*, 145 Ala. 426, 41 So. 405 (1906), it was held that the delivery of a telegram to the eleven year old son of the sendee, while at play with other boys near his home, is as a matter of law no delivery to the sendee.

92. *Blackwell M. & E. Co. v. West. Un. T. Co.*, 17 Okl. 376, 89 Pac. 235 (1906), applying *Wilson's Rev. & Ann. St. 1903*, § 699. Similar statutory provisions exist in Cal. Civil Code, § 2162; Mont. Civil Code, § 2861; North Dak. Rev. Codes, 1905, § 5671; South Dak. Rev. Codes, 1903, § 1576.

93. *Walker v. West. Un. Tel. Co.*, 75 S. C. 512, 56 S. E. 38 (1906), and cases in preceding notes; *Reed v. West. Un. Tel. Co.*, 135 Mo. 661, 673, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609 (1896).

94. *Green v. West. Un. Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 67 L. R.

This presumption has received statutory recognition in several States.⁹⁶

594. Non-Repetition of Messages. Even in jurisdictions where the company is permitted to stipulate for a repetition of the message as a condition of liability for mistakes in transmission, this stipulation has been declared not to absolve the company from liability for the non-delivery of the message.⁹⁷

§ 6. DAMAGES.

595. For Refusal or Failure to Serve. We have seen that these companies are under a legal duty to serve, without discrimination and upon proper terms, all persons who properly apply for such service.⁹⁸ A breach of this duty, without legal justification, subjects the company to a tort action;⁹⁹ and if the breach is attended with personal abuse of the patron, he may recover damages for the humiliation and shame to which he was unlawfully subjected.¹⁰⁰

596. Nominal Damages. The person wronged by the company's breach of duty to serve the public,¹ or by its breach of a contract for service into which it has entered² is entitled to at least nominal damages.

597. Compensatory Damages. When a telegraph or telephone company refuses to serve a patron, without legal excuse, it is liable to him for such damages as he can show he has sustained by reason of the company's breach of duty. These damages, it has been

A. 985 (1904), and cases cited in the opinion; *Hellams v. West. Un. Tel. Co.*, 70 S. C. 83, 87, 49 S. E. 12 (1904).

^{95.} *Fowler v. West. Un. Tel. Co.*, 80 Me. 381, 390, 15 At. 29, 6 Am. St. Rep. 211.

^{96.} Fla. L. 1907, ch. 5628 (No. 33), § 2; Iowa Code, 1897, Tit. X, ch. 8, § 2164.

^{97.} *Purdom Naval Stores Co. v. West. Un. Tel. Co.*, 153 Fed. 327 (1907); *Francis v. West. Un. Tel. Co.*, 58 Minn. 252, 259, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507 (1894).

^{98.} *Supra*, ch. XVI, § 1.

^{99.} *Cumberland T. & T. Co. v. Allen*, 89 Miss. 832, 42 So. 666 (1906).

^{100.} *Dunn v. West. Un. Tel. Co.*, 2 Ga. App. 845, 59 S. E. 189 (1907), citing text of First Ed. p. 101, and cases there noted.

^{1.} *Young v. West. Un. Tel. Co.*, 107 N. C. 370, 373, 11 S. E. 1044 (1890).

^{2.} *Kennon v. West. Un. Tel. Co.*, 126 N. C. 232, 35 S. E. 468 (1900); *Hibbard v. West. Un. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775 (1873); *West. Un. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577 (1888).

declared, are not confined to the pecuniary loss which plaintiff has suffered, but include a fair compensation for the inconvenience and annoyance which the defendant's breach of duty has caused the plaintiff.³ Of course, when the plaintiff claims for actual pecuniary loss, he must sustain his claim by competent evidence.⁴

598. Damages Recoverable by the Sender. We are not concerned, at present, with actions brought by the sender for breach of contract, but only with tort actions. In jurisdictions where the sender may sue in tort, for the company's breach of its legal duty, he will find it to his advantage, generally, to bring his action for the tort, rather than for the breach of contract.⁵ If his action is *ex contractu*, the sender is limited to "such damages as may reasonably be supposed to have been contemplated by the parties, when making the contract as the probable result of the breach."⁶ Accordingly, if the special circumstances under which the contract is made are communicated to the company by the sender, the latter can recover the amount of injury which would ordinarily follow from a breach of the contract under these special circumstances so known by the company.⁷ But if the special circumstances are not communicated to the company, the latter can be supposed to have had in its contemplation, when breaking the contract, only the

3. *Cumberland T. & T. Co. v. Hobart*, 89 Miss. 252, 42 So. 349 (1906), the jury awarded \$150 damages, which the court declared was not excessive. Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. Rep. 509 (1902), but they are not allowed in actions *ex contractu*, as held in the Francis case.

4. *Cumberland T. & T. Co. v. Hicks*, 89 Miss. 270, 42 So. 285 (1906).

5. *Supra*, chap. II, ¶ 20; *Cowan v. West. Un. Tel. Co.*, 122 Ia. 379, 98 N. W. 281, 64 L. R. A. 545 (1904); *Bal. City Pass. Ry. v. Kemp*, 61 Md. 619, 625, 48 Ann. Rep. 134 (1883).

6. *Francis v. West. Un. Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507 (1894). In Minnesota, damages for mental anguish are allowed in tort actions for the breach of a legal duty owing by defendant to plaintiff, *Sanderson v. Nor. Pac. Ry.*, 88

7. *West. Un. Tel. Co. v. Bates*, 93 Ga. 352, 20 S. E. 639 (1893), increased expenses of journey; *West. Un. Tel. Co. v. Hines*, 96 Ga. 688, 23 S. E. 845, 51 Ann. St. Rep. 159 (1895); *West. Un. Tel. Co. v. Woods*, 56 Kan. 737, 44 Pac. 989 (1896); *Reed v. West. Un. Tel. Co.*, 135 Mo. 666, 37 S. W. 904, 34 L. R. A. 492 (1896); *West. Un. Tel. Co. v. Wilhelm*, 48 Neb. 910, 67 N. W. 870 (1896); *West. Un. Tel. Co. v. Church*, 3 Neb. unofficial, 22, 90 N. W. 878, 57 L. R. A. 905 (1902); *U. S. Tel. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751 (1867).

amount of damages which would arise in the ordinary case, unaffected by these special circumstances.⁸

599. On the other hand, if the action is brought *ex delicto*, the plaintiff is not limited to damages, which can be shown to have been within the actual contemplation of the parties, as the probable result of defendant's wrongdoing, but he is entitled to recover all the direct injury resulting from such wrongful act, although the extent or special nature of the resulting injury could not with certainty have been foreseen or contemplated as the probable result of the defendant's misconduct.⁹ This is in accordance with the rule which obtains in tort actions by a passenger against a common carrier.¹⁰

600. **Damages Recoverable by the Sendee.** The general rule applicable here is that the company is answerable in damages for all losses and injuries that may be traced directly, or with reason-

8. *West. Un. Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649 (1890), expenses of journey recoverable, but not loss in business caused by closing plaintiff's mill during journey; *Smith v. West. Un. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126 (1885); *Squire v. West. Un. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157 (1867); *Mackay v. West. Un. Tel. Co.*, 16 Nev. 222 (1882); *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165 (1871); *First Nat. Bank v. West. Un. Tel. Co.*, 30 Oh. St. 555, 27 Am. Rep. 485 (1876); *Ferguson v. Anglo-Am. Tel. Co.*, 178 Pa. 377, 35 At. 979, 35 L. R. A. 554, 56 Am. St. Rep. 770 (1896); *Primrose v. West. Un. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883 (1893); *West. Un. Tel. Co. v. Coggin*, 68 Fed. 137, 15 C. C. A. 231, and extended note (1895); *West. Un. Tel. Co. v. Morris*, 83 Fed. 992, 28 C. C. A. 56, and note (1897).
9. *West. Un. Tel. Co. v. DuBois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109 (1889); *Mentzer v. West. Un. Tel. Co.*, 93 Ia. 757, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294 (1895); *McPeck v. West. Un. Tel. Co.*, 107 Ia. 356, 362, 78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 205 (1899); *Cowan v. West. Un. Tel. Co.*, 122 Ia. 379, 386, 98 N. W. 281, 64 L. R. A. 545 (1904); *Young v. West. Un. Tel. Co.*, 107 N. C. 370, 375, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883 (1890); *Barnes v. West. Un. Tel. Co.*, 27 Nev. 438, 76 Pac. 931, 103 Am. St. Rep. 776, 65 L. R. A. 666 (1904); *West. Un. Tel. Co. v. Wells*, 50 Fla. 474, 39 So. 838, 111 Am. St. Rep. 129 (1905).
10. *Balt. City Pass. Ry. v. Kemp*, 61 Md. 74, 81 (1883); *Sloan v. Southern Cal. Ry.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193 (1896); *Brown v. Chic., M. & St. P. Ry.*, 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41 (1882); *McKeon v. Chic., M. & St. P. Ry.*, 94 Wis. 477, 69 N. W. 175, 35 L. R. A. 252, 59 Am. St. Rep. 909 (1896).

able certainty, to its breach of legal duty to plaintiff.¹¹ Accordingly, a physician, or attorney, to whom a message has been duly sent, but who fails to receive it through the negligence of the company, and thus loses a fee, is entitled to recover from the company the amount thus lost.¹² So a person who loses the profits of a business transaction, because of the company's negligent failure to promptly deliver a message,¹³ or of its negligent failure to correctly transmit it,¹⁴ is entitled to compensatory damages.

It will be observed that plaintiff's damages, in order to be recoverable, must be the proximate result of the company's breach of duty to the plaintiff.¹⁵

Exemplary or punitive damages may be recovered, when the defendant's negligence is gross, or its misconduct causing harm to plaintiff is wilful or wanton.¹⁶

11. *Alexander v. West. Un. Tel. Co.*, 66 Miss. 161, 5 So. 397, 3 L. R. A. 71, 14 Am. St. Rep. 556 (1888). This action was brought by the sender, but the rule is the same for the sendee. See *Frazier v. West. Un. Tel. Co.*, 45 Ore. 414, 78 Pac. 330, 67 L. R. A. 319 (1904), and note on the case in 5 *Columbia Law Rev.* 169, 170.

12. *West. Un. Tel. Co. v. McLaurin*, 70 Miss. 26, 13 So. 36 (1892); attorney entitled to recover statutory penalty and the loss of fees; *Fairly v. West. Un. Tel. Co.*, 73 Miss. 6, 18 So. 796 (1895), physician entitled to recover penalty and the loss of fees; *West. Un. Tel. Co. v. Longwell*, 5 N. Mex. 308, 21 Pac. 339 (1889), physician held entitled to recover difference between fee he would have earned, and what he did earn at home, fixed by the court at \$100. In *Wood v. West. Un. Tel. Co.*, 40 S. C. 524, 19 S. E. 67 (1893), the court declared that the physician's loss in such a case is special damages which must be specially pleaded.

13. *Western Un. Tel. Co. v. Fat-*

man, 73 Ga. 285 (1884); *Walden v. West. Un. Tel. Co.*, 105 Ga. 275, 31 S. E. 172 (1898); *Ferrero v. West. Un. Tel. Co.*, 9 App. D. C. 455, 35 L. R. A. 548 (1896).

14. *Propeller Towboat Co. v. West. Un. Tel. Co.*, 124 Ga. 478, 52 S. E. 766 (1905); *Reed v. West. Un. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609 (1896); *West. Un. Tel. Co. v. Crawford*, 110 Ala. 460, 20 So. 111 (1896); *West. Un. Tel. Co. v. Beals*, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682 (1898).

15. *West. Un. Tel. Co. v. Merrill*, 144 Ala. 618, 626, 38 So. 121, 113 Am. St. Rep. 66, 71 (1905), whether the damages were proximate in this case was held to be a question for the jury; *Bowyer v. West. Un. Tel. Co.*, 130 Ia. 324, 106 N. W. 748 (1906); *Stansell v. West. Un. Tel. Co.*, 107 Fed. R. 668 (1900).

16. *West. Un. Tel. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283 (1903); *Accord. West. Un. Tel. Co. v. Seed*, 115 Ala. 670, 22 So. 474 (1896); \$1,500 not excessive; *Young v. West. Un. Tel. Co.*, 65 S. C. 93, 43

601. **Damages for Injuries to the Feelings.** This subject has been considered in a former connection.¹⁷ The multitudinous cases which have been brought before the courts, in the States where these damages are recoverable from telegraph companies, since the first edition of this work was published, show that the Texas doctrine has opened a prolific source of litigation.¹⁸

S. E. 448 (1902); *Butler v. West Un. Tel. Co.*, 65 S. C. 510, 44 S. E. 91 (1902); *Telegraph Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118 (1900), \$1,000 not excessive.

17. *Supra*, chap. III, ¶¶ 120-123.

18. *Roberts v. Western Un. Tel. Co.*, 73 S. C. 520, 53 S. E. 985, 114 Am. St. Rep. 100, and note (1906); would have brought mental anguish to a reasonable human being in plaintiff's situation; *Cowan v. West Un. Tel. Co.*, 122 Ia. 379, 98 N. W. 281 (1904); *Green v. West Un. Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985 (1904); *Kennon v. West Un. Tel. Co.*, 126 N. C. 232, 35 S. E. 468 (1900), containing enumeration of cases in which recovery has been allowed.

CHAPTER XVII.

INJUNCTION AS A TORT REMEDY.

§ 1. PURPOSE AND SCOPE OF THIS CHAPTER.

602. **Limited to Tort Actions.** It is not the purpose of this chapter to discuss the equitable remedy of injunction, in all its bearings, but only in connection with suits for the redress of torts; and our attention will be directed to the general principles in accordance with which injunctions are obtained and enforced in such actions. In the first edition, the present topic was not discussed separately nor at length, although the use of injunctions was referred to in connection with various torts.¹ But the frequency with which this remedy has been resorted to during the last decade, the objections which have been raised to its employment, especially in labor, liquor and commerce cases,² and its potency either for good or evil, have led to the belief that the reader will welcome a brief discussion of this topic, even in a treatise which is studiously confined to common law doctrines.

603. **Modern Application of Established Principles.** The extent to which the use of injunctive relief has increased, during a half century may be seen almost at a glance by comparing any late American treatise on this topic with one of the earlier English works.³ Our courts are careful, however, to declare that in using the injunction more freely in tort cases than formerly, they are not exercising a new power; but are only making "an application of the writ to a new condition of things that exists in our day by reason of the advancement in civilization."⁴ They are careful,

1. *Supra*, ¶¶ 221, 341, 496, 510.

2. *Equity applied to crimes and misdemeanors*, 31 *Am. L. Reg. N. S.* 1 (1892); *Editorial Notes*, 31 *Am. L. Reg. N. S.* 782 (1892); *A Protest against Administering Criminal Law by Injunction*, 33 *Am. L. Reg. N. S.* 879 (1894); *Injunctions against Liquor Nuisances*, 9 *Harv. L. Rev.* 521 (1896); *Government by Injunction*, 11 *Harv. L. Rev.* 487

(1898); *Government by Injunction*, 13 *L. Quar. Rev.* 347 (1897); *Injunction and Organized Labor*, 17 *Am. Bar Assoc. Rep.* 299 (1894).

3. Compare the latest edition of *High on Injunctions* with *Eden on Injunctions*. See *The Law of Privacy*, by Wilbur Larremore, 12 *Columbia Law Rev.* 693 (1912).

4. *U. S. ex rel. Guaranty Trust Co. v. Haggerty*, 116 *Fed.* 510, 515

also, to refuse this form of relief, when, in their opinion, it would interfere improperly with the liberties of the citizen.⁵ But the mere fact that a particular application for an injunction is novel does not furnish a fatal objection to its employment.⁶

604. Classification of Tort Injunctions. Judge Story enumerated the most important ones as follows: "To restrain waste; to restrain nuisance; to restrain trespasses; and to prevent other irreparable mischiefs."⁷ It is the last of the foregoing classes which has multiplied most rapidly during recent years, and over the employment of which great controversy has arisen.⁸ The matter is largely controlled by definite legislative enactments in many of our States.⁹

§ 2. TO RESTRAIN WASTE.

605. Common Law Remedies Insufficient. Blackstone, after describing the common law remedies for waste, tells us that besides these "the courts of equity, upon bill exhibited therein, complaining of waste and destruction, will grant an injunction in or-

(1902). Judge Jackson said: "It is true that our courts have been criticised severely by persons who are inimical to the use of it, and have denounced the courts for 'governing by injunctions.' But this criticism is so obviously unjust to the courts that it is unnecessary to enter into any defense of them. For five or six centuries back it was not an uncommon thing for the courts of our English ancestors to grant a prohibitory writ, as well as a writ of restitution, against persons who combine for any unlawful purpose."

5. *New York, N. H. & H. Ry. v. Interstate Commerce Commission*, 200 U. S. 361, 404, 26 Sup. Ct. 272, 50 L. Ed. 515 (1906), "To accede to the doctrine relied upon (by the commission) would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the

fundamental liberties of the citizen."

6. *Nashville, C. & St. L. Ry. v. McConnell*, 82 Fed. 65, 76 (1897).

7. *Story's Equity Jurisprudence*, § 873 (13th Ed.).

8. *Modern Use of Injunctions*, 10 *Polit. Sc. Quarterly*, 189 (1895).

9. *California Code of Civ. Proc.*, §§ 525-533, chap. 235, L. 1903, provides that persons engaged in trade disputes shall not be "indictable or otherwise punishable for the crime of conspiracy, if such act committed by one person would not be punishable as a crime, nor shall such agreement, combination or contract be considered in restraint of trade or commerce, nor shall any restraining order or injunction be issued with relation thereto;" *New York Code of Civil Proc.*, §§ 602-630; *North Carolina Code of Civil Proc.*, §§ 806-821.

der to stay waste, until the defendant shall have put in his answer, and the court shall thereupon make further order. Which is now become the most usual way of preventing waste.”¹⁰ Story closes his review of the cases, in which equity has intervened in behalf of victims of waste, with the following statement: “The inadequacy of the remedy at common law, as well to prevent waste as to give redress for waste already committed, is so unquestionable that there is no wonder that the resort to the courts of law has, in a great measure, fallen into disuse. The action of waste is of rare occurrence in modern times, an action on the case for waste being generally substituted in its place, whenever any remedy is sought at law. The remedy by a bill in equity is so much more easy, expeditious and complete, that it is almost invariably resorted to. By such a bill not only may future waste be prevented, but an account may be decreed and compensation given for past waste. Besides an action on the case will not lie at law for permissive waste, but in equity an injunction will be granted to restrain permissive waste as well as voluntary waste.”¹¹

606. Requisites for the Injunction.¹² Without stopping to define the various kinds of waste, and referring the reader to treatises upon real property law, for such definitions, let us consider very briefly the conditions upon which a court of equity will grant an injunction against waste.

As a rule, the plaintiff is required to show that his clear rights are unlawfully invaded by the defendant's conduct, which is sought to be enjoined.¹³ If he admits that his rights are disputed by the

¹⁰ Commentaries, Vol. 3, p. 227. (1857), in which waste is referred

¹¹ Story's Equity Jurisprudence, to as a tort restrainable at common § 917 (3d Ed.). In *Jefferson v. Bishop of Durham*, 1 Bos. & P. 105, 121 (1797), Eyre, Ch. J., and, at p. 129, Heath, J., discussed the common law writ of prohibition against waste and reached the conclusion that the Court of Common Pleas could not grant it in that case, although the intimation is thrown out that equity might have restrained the waste complained of. See *Denny v. Brunson*, 29 Pa. 382

¹² For a full discussion of this topic the reader is referred to High on Injunctions, chap. XI, and similar treatises.

¹³ *Nethery v. Paine*, 71 Ga. 374 (1883); *Snyder v. Hopkins*, 31 Kan. 557, 3 Pac. 367 (1884); *Amelang v. Seekamp*, 9 G. & J. (Md.) 468, 472

defendant, and the subject of litigation, an injunction will not be granted¹⁴ unless he shows that "irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from mine, or the cutting down of timber, or the removal of coal" during the pendency of the litigation.¹⁵

If the injunction is asked because of irreparable mischief, threatened or in progress, the plaintiff must state facts which show that the mischief is of the character charged.¹⁶ If the mischief is a thing of the past, an injunction will be denied, for in such a case the plaintiff's remedy is at law.¹⁷ But if the acts of waste are recent and show that the defendant intends to continue his misconduct, an injunction will be granted.¹⁸

607. Some of the forms of waste which have been frequently enjoined are the destruction of trees,¹⁹ the destruction of buildings,

(1838); *Higgins v. Woodward*, Hopk. Ch. (N. Y.) 342 (1826); *Tacoma Ry. & Power Co. v. Pacific Traction Co.*, 155 Fed. 259, 261 (1907).

14. *Pillsworth v. Hopton*, 6 Ves. 51, 1 Keener's Cases on Eq. Jurisdiction, 543 (1801). Lord Eldon said: "I remember perfectly being told from the bench very early in my life, that if the plaintiff filed a bill for an account, and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction." *Accord.* Cases in preceding note; also, *West v. Walker*, 3 N. J. Eq. (2 Green's Ch.) 279 (1835); *Miller v. Rushforth*, 4 N. J. Eq. (3 Green's Ch.) 177 (1842); *Kerlin v. West*, 4 N. J. Eq. 448 (1844); *Le Roy v. Wright*, 4 Sawy. (U. S. C. C.) 530 (1864).

15. *Erhardt v. Boaro*, 113 U. S. 537, 538, 5 Sup. Ct. 565, 28 L. Ed. 1116 (1885): "It was formerly the doctrine of equity not to restrain the use and enjoyment of the premises

by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to the title was deemed sufficient to exclude the jurisdiction of the court. . . . This doctrine has been greatly modified in modern times." *Accord.* *Jerome v. Ross*, 7 Johns. Ch. 315, 332, 11 Am. Dec. 484 (1823); *West Point I. Co. v. Reymert*, 45 N. Y. 703 (1871); *West v. Walker*, 3 N. J. Eq. (2 Green's Ch.) 279, Note A, 285-290 (1835); *Wallula Pac. Ry. Co. v. Portland & S. Ry. Co.*, 154 Fed. 902 (1906).

16. *Bogey v. Shute*, 54 N. C. (1 Jones Eq.) 180 (1854); *Hamilton v. Ely*, 4 Gill (Md.) 34 (1846).

17. *Godwin v. Phifer*, 51 Fla. 441, 41 So. 597, 601 (1906); *Owen v. Ford*, 49 Mo. 436 (1872); *Carlin v. Wolf*, 154 Mo. 539, 51 S. W. 679, 55 S. W. 441 (1899).

18. *Barry v. Barry*, 1 Jac. & W. 651 (1820).

19. *Abrahall v. Bubb*, 2 Swanston, 172 (1679); *Skelton v. Skelton*, 2

or their irreparable injury,²⁰ the wrongful interference with valuable springs or other waters,²¹ or with gas or petroleum,²² or with mines and quarries;²³ where the defendant's conduct amounts to a destruction or wasting of the very substance of the estate.

§ 3. TO RESTRAIN NUISANCES.

608. A Modern Remedy. The resort to injunctive relief against nuisances is quite modern, as has been stated on a former page,²⁴ and, until the last half century, was not much encouraged even by equity judges.²⁵ At present, however, it is frequently employed, not only on behalf of the State in cases of public nuisances,²⁶ but on behalf of individuals who have been especially

Swanston, 170 (1677); Packington v. Packington, Dickens, 101 (1745); Kinsler v. Clarke, 2 Hill's Ch. (S. C.) 617 (1837), the chief value of the land was the timber, and it was probable that defendant was not financially able to pay the damages; Davis v. Hull, 67 Ia. 479, 25 N. W. 740 (1885); Buskirk v. King, 72 Fed. 22, 18 C. C. A. 418 (1896).

20. Vane v. Lord Barnard, 2 Vern. 738, 1 Salk. 161, Prec. Ch. 454 (1716); Dooly v. Stringham, 4 Utah, 107, 7 Pac. 405 (1885). It is no answer for the defendant that he intends to put up better buildings in the place of those he threatens to destroy.

21. Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 64 L. R. A. 236, 99 Am. St. Rep. 35 (1903); Meadow Valley Mining Co. v. Dodds, 6 Nev. 261, 8 Am. Rep. 709 (1871); Forbell v. City of New York, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666 (1900).

22. Manufacturers' Gas & O. Co. v. Ind. Nat. G. & O. Co., 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768 (1900); Louisville Gas Co. v. Kentucky Heating Co., 117 Ky. 71, 77 S. W. 368, 25 Ky. L. R. 1221 (1903); Williamson v. Jones, 39 W. Va. 231, 19

S. E. 436, 25 L. R. A. 222 (1894); Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895 (1903).

23. West Point Iron Co. v. Rymert, 45 N. Y. 703, 705 (1871). See Bishop of London v. Web, 1 Peere Williams, 527 (1718), defendant was enjoined from converting the soil into bricks.

24. Supra, ¶ 510, and authorities cited.

25. Earl of Ripon v. Hobart, 3 M. & K. 169, 180 (1834): "The jurisdiction of this court over nuisance by injunction at all is of recent growth, and has at various times found great reluctance on the part of the learned judges to use it." *Accord.* Fishmongers' Company v. East India Co., 1 Dickens, 163 (1752); Bush v. Western, Finch's Prec. in Ch. 530 (1720); Anonymous, 1 Ves. Jr. 140 (1790).

26. Attorney General v. Cleaver, 18 Ves. 211 (1811); Attorney General v. Sheffield Gas Consumers' Co., 3 De G., M. N. & G. 304 (1853), containing a full discussion of the topic, but holding a case for injunction had not been made out; Attorney General v. Brighton & Hove Co-Op. S. Assoc. (1900), 1 Ch. 276,

harmed by a public nuisance,²⁷ or who have been the victims of nuisances of a private nature.²⁸

609. The Principles Upon Which It Is Granted. These have been stated by Lord Brougham as follows: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial; and will, according to the circumstances, direct an issue, or allow an action, and, if need be, expedite the proceedings, the injunction being in the meantime continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to the circumstances, prove so, the court will refuse to interfere until the matter has been tried at law, generally by action, though, in particular cases, an issue may be directed for the satisfaction of the court where an action could not be framed so as to meet the question."²⁹ In short, a court of equity, in granting injunctions to restrain nuisances, acts in aid of the plaintiff's legal right, and with a view to his protection from irremediable loss, or from an injury which could not be adequately redressed in a common law suit.

An injunction will not be denied to restrain a nuisance simply because the maintenance of that nuisance is also a crime.³⁰ Nor will it be denied, necessarily, even though the loss inflicted upon

69 L. J. Ch. 204; *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393 (1893); *Coast Company v. Mayor of Spring Lake*, 58 N. J. Eq. 586, 17 At. 1131, 51 L. R. A. 657 (1897); *U. S. v. Duluth*, 1 Dill. 469 (1870); *North Bloomfield G. M. Co. v. U. S.*, 88 Fed. 664, 32 C. C. A. 84 (1898).

27. *Crawford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514 (1891); *Callahan v. Gilman*, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831 (1887).

28. *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. App. 705, 44 L. J. Ch. 149 (1874); *Campbell v.*

Seaman, 63 N. Y. 568, 20 Am. Rep. 567 (1876).

29. *Earl of Ripon v. Hobart*, 3 M. & K. 169, 179 (1834).

30. *Tedescki v. Berger*, 150 Ala. 649, 43 So. 960, 11 L. R. A. N. S. 1060 (1907), the keeping of a house of prostitution was restrained; *Columbian Athletic Club v. State ex rel. McMahon*, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727 (1895), restraining prize-fighting; *State v. Crawford*, 28 Kan. 726, 42 Neb. Rep. 182 (1882), restraining an illegal drinking saloon; *Weakley v. Page*, 102 Tenn. 178, 53 S. W. 551, 46 L. R. A. 552, house of ill-fame.

the defendant by the injunction is greater than the pecuniary harm caused by the nuisance to the plaintiff.³¹

610. Examples of nuisance injunctions have been disclosed by the cases already cited. It will be observed that they include nuisances to running streams, or springs, or wells,³² to the personal comfort of the plaintiff;³³ to his health;³⁴ to his real property easements,³⁵ and the like. But whether an injunction will be granted in any specific case falling within either of these classes, depends upon the circumstances of that case.³⁶ Moreover, if the damage

31. *Tucker v. Howard*, 128 Mass. 361 (1880). Damage to plaintiff's estate was \$200, and the expenses to defendant of abating the nuisance would be \$530, but a mandatory injunction was issued, because "a court of equity will not allow the wrong-doer to compel innocent persons to sell their right at a valuation, but will compel him to restore the premises, as nearly as may be, to their original condition." *Accord.* *O'Brien v. Goodrich*, 177 Mass. 32, 34, 58 N. E. 151 (1900); *Lynch v. Union Inst. for Savings*, 158 Mass. 394, 33 N. E. 603, 159 Mass. 306, 34 N. E. 364, 20 L. R. A. 843 (1893). But in *Elmhirst v. Spencer*, 2 M. N. & G. 45 (1849); *English v. Progress El. L. & M. Co.*, 95 Ala. 259, 10 So. 134 (1891), and *Starkie v. Richmond*, 155 Mass. 188, 29 N. E. 770 (1892), injunction was denied because (in part) the harm to the defendant would have been so much greater than to the plaintiff, that the writ would have operated inequitably and oppressively; *Whalen v. Union Bag & Paper Co.*, 208 N. Y. 1, 101 N. E. 805 (1913).

32. *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526 (1816); *Corning v. Troy, I. & N. Factory*, 40 N. Y. 191 (1869); *Bailey v. Schnitzins*, 45 N. J. Eq. 178, 16 At. 680 (1888).

33. *Soltau v. DeHeld*, 2 Sim. N. S. 133 (1851), containing a full discussion of principles and precedents; *English v. Progress El. L. & M. Co.*, 95 Ala. 259, 10 So. 134 (1891); *Hennesy v. Carmony*, 50 N. J. Eq. 616, 25 At. 374 (1892).

34. *Turner v. Mirfield*, 34 Beav. 390 (1865); *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 737 (1890); *Lowe v. Prospect Hill Cem. Assoc.*, 58 Neb. 94, 78 N. W. 488, 46 L. R. A. 237 (1889).

35. *Jackson v. Duke of Newcastle*, 3 DeG. J. & S. 275 (1864); injunction dissolved, because not shown that plaintiff's wrongs could not be redressed by damages; *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. App. 704, 44 L. J. Ch. 149 (1874); *Galway v. Met. El. Ry.*, 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788 (1891); *Williams v. Los Angeles Ry.*, 150 Cal. 592, 89 Pac. 330 (1907), temporary injunction denied, because threatened damage was chiefly monetary and not irremediable; *Dewire v. Hanley*, 79 Conn. 454, 65 At. 583 (1907).

36. *McCord v. Iker*, 12 Oh. 387 (1843): "We wish to lay down no rule which will at all interfere with the wholesome and necessary prin-

caused by the nuisance has been consummated, the court will not grant an injunction, as the plaintiff's remedy at law is sufficient.³⁷ Nor will the court enjoin the erection of a proposed structure which may be a nuisance to plaintiff, unless it is clear that it will so infringe his legal rights as to amount to a nuisance, which he would be entitled to abate.³⁸ Nor is an injunction the proper remedy for a village against those violating its ordinances.^{38a}

§ 4. TO RESTRAIN TRESPASSES.

611. General Rule. Formerly, it was not considered the duty of a court of equity to employ the extraordinary writ of injunction in a case of naked trespass, where there was no privity of title, and where a legal remedy for damages existed;³⁹ even though the trespasser was insolvent.⁴⁰ Lord Eldon repeatedly expressed surprise that the jurisdiction by injunction was taken so freely in waste, and not in trespass,⁴¹ yet he made no attempt to revolutionize the practice in this respect, but contented himself with granting "the writ in solitary cases, of a special nature, and where irreparable damage might be the consequence if the act continued."⁴²

ample, that where the injury complained of will be irreparable, going to the ruin or destruction of the property, equity will interfere; but we must say that the present case does not warrant its exercise."

37. *Herbert v. Penn. Ry. Co.*, 43 N. J. Eq. 21, 10 At. 872 (1887): "The complainant's building is now badly wrecked and deserted by its tenants, and the possible future damage to him will be small in comparison to the injury which the issuance of either a preventive or mandatory injunction, at this time, will certainly work to the defendant. In such a situation, the plaintiff must be left to his legal remedy."

38. *Whitmore v. Brown*, 100 Me. 410, 65 At. 516 (1907).

38a. *Higgins v. Lacroix*, 119 Minn.

145, 137 N. W. 417, 41 L. R. A. N. S. 737 (1912).

39. *Mogg v. Mogg*, Dickens, 670 (1786); *Stevens v. Beekman*, 1 Johns Ch. 318 (1814); *Garstin v. Asplin*, 1 Madd. Ch. 150 (1815); *Deere v. Guest*, 1 M. & Craig, 516 (1836).

40. *Mechanics' Foundry v. Ryall*, 75 Cal. 601 (1888); *Centreville & A. B. T. Co. v. Barnett*, 2 Ind. 537 (1851).

41. *Smith v. Collyer*, 8 Ves. 89 (1803); *Crockford v. Alexander*, 15 Ves. 138 (1808); *Thomas v. Oakley*, 18 Ves. 184 (1811).

42. Chancellor Kent, in *Stevens v. Beekman*, 1 Johns. Ch. 318 (1814); and see *Livingston v. Livingston*, 6 Johns. Ch. 497 (1822); *Mitchell v. Dors*, 6 Ves. 147 (1801); *Hanson v. Gardiner*, 7 Ves. 305 (1802); *Smith v. Collyer*, 8 Ves. 89 (1803).

At present, the English courts feel themselves authorized by the judicature acts to grant injunctions against trespasses with great freedom.⁴³

612. When Granted. The first recorded instance of an injunction to restrain trespass, as distinguished from waste, is in Flamang's case,⁴⁴ which is described by Lord Eldon as "very near waste;" a precedent followed by him in cases "partaking of the nature of waste."⁴⁵

In some cases, the trespass sought to be enjoined partakes of the nature of a nuisance,⁴⁶ or becomes a nuisance by reason of its continued repetition,^{46a} and is enjoined because of this characteristic.

The usual ground, however, for granting an injunction to restrain trespasses is that, in the particular case, an action at law for damages cannot afford the plaintiff full and adequate relief.⁴⁷ This may be due to the fact that the trespass amounts to a "taking of the substance of the estate,"⁴⁸ especially if the trespasser is insolvent;⁴⁹ or it may be due to the fact that plaintiff would be put to a multiplicity of suits at law, if he could not secure from a court

43. *Shaw v. Earl of Jersey*, 3 C. 10 L. R. A. N. S. 921 (1907); P. D. 359, 361, 48 L. J. 308 (1879): "There could be no precedent for a case like this before the Judicature Acts, 1873, 1875;" *Stocker v. Planet Building Soc.*, 27 W. R. 877 (1879). **46a.** *Central Iron & Coal Co. v. Vandenhank*, 147 Ala. 546, 41 So. 145 (1906); *Wilson v. Meyer*, 144 Ala. 402, 39 So. 317 (1905).

44. Referred to in *Mitchell v. Dors*, 6 Ves. 147 (1801), and *Hanson v. Gardiner*, 7 Ves. 305 (1802), and decided by Lord Thurlow.

45. *Smith v. Collyer*, 8 Ves. 89 (1803); *Courthorpe v. Mapplesden*, 10 Ves. 290 (1804). The case of *Hamilton v. Worsefold*, Register's Book A. 1876, fol. 1, (reported in Romilly's note to *Courthorpe v. Mapplesden*, supra), seems to have been decided by Lord Thurlow, upon the same principle.

46. Supra, ch. XIV, § 1; *Henderson v. N. Y. Cen. Ry.*, 78 N. Y. 423 (1879); *Whittaker v. Stangvick*, 100 Minn. 386, 111 N. W. 295,

47. *Moore v. Ferrell*, 1 Ga. 7, 10 (1846); *Livingston v. Livingston*, 6 Johns. Ch. (N. Y.) 497 (1822); *N. Y. Printing & D. Estab. v. Fitch*, 1 Paige (N. Y.) 97 (1828).

48. *Thomas v. Oakley*, 18 Ves. 184 (1811); *Lowndes v. Bettie*, 33 L. J. Ch. 45, 10 Jur. N. S. 226 (1864): "It appears to me that the case comes under the head of irremediable waste, as defined by Lord Eldon, that is, destruction of the substance of the estate."

49. *Musselman v. Marquis*, 64 Ky. (1 Bush.) 463, 89 Am. Dec. 637 (1866); *Ladd v. Osborne*, 79 Ia. 93, 44 N. W. 235 (1890).

of equity preventive relief by injunction.⁵⁰ But the right to this sort of relief is not limited to any particular set of circumstances, nor is the court governed by any hard and fast rule, in granting or refusing it. If the court is convinced that the expense of suits at law for trespasses will be excessive and disproportionate to the damages, especially if the defendant is trespassing wilfully and without color of legal right;⁵¹ or if, for any other reason, common law relief is clearly inadequate, an injunction will issue.⁵² In the first case cited in the last preceding note, Vice Chancellor Bruce said: "It is, I think, certainly true, that the court of chancery does not treat questions of destructive damage to property now exactly as it did forty or fifty years back—that its protection in such respects is more largely afforded than it then generally was."

§ 5. TO PREVENT OTHER MISCHIEFS.

613. Growth of This Class. It is this class of injunctions, which has grown most rapidly in recent years.^{52a} In England, the power of the courts at the present time to issue an injunction ex-

50. Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74 (1896); Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 Pac. 532 (1907); Keil v. Wright, 135 Ia. 383, 112 N. W. 633, 13 L. R. A. N. S. 134 (1907); Halpin v. McCune, 107 Ia. 494, 78 N. W. 210 (1899); Wheelock v. Noonan, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405 (1888); Ladd v. Osborne, 79 Ia. 93, 44 N. W. 235 (1890); Goodson v. Richardson, L. R. 9 Ch. App. 221, 43 L. J. Ch. 790 (1874); Griffith v. Hilliard, 64 Vt. 643, 25 At. 427 (1890); (1845); Stanford v. Hurlstone, L. R. 9 Ch. App. 116 (1873), injunction against cutting down trees, following Lowndes v. Bettie, 33 L. J. Ch. 451, 10 Jur. N. S. 226 (1864); Henderson v. N. Y. Cen. Ry., 78 N. Y. 423 (1879); Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116 (1885); Keil v. Wright, 135 Ia. 383, 112 N. W. 633, 13 L. R. A. N. S. 134 (1907), injunction restraining defendant's domestic fowls from trespassing on plaintiff's premises.

51. Goodson v. Richardson, L. R. 9 Ch. App. 221, 43 L. J. Ch. 790 (1874); Providence F. R. & N. S. Co. v. City of Fall River, 183 Mass. 535, 543, 67 N. E. 647 (1903); Lynch v. Union Inst. for Savings, 158 Mass. 394, 33 N. E. 603 (1893); S. C. again 159 Mass. 306, 308, 34 N. E. 1072 (1893).

52. Haigh v. Jaggard, 2 Collyer, 231

52a. State ex rel. Wausau St. Ry. v. Bancroft, 148 Wis. 124, 134 N. W. 330, 38 L. R. A. N. S. 526 (1912), enjoining State official from virtual confiscation of relator's property; Norton v. Randolph, — Ala. —, 58 So. 283, 40 L. R. A. N. S. 129 (1912), injunction granted against maintaining a spite fence; Kinney v. Scarbrough Co., 138 Ga. 77, 74 S. E. 772, 40 L. R. A. N. S. 473

tends to any case where it is right and just to grant it.⁵³ While the courts of this country have not received from legislation so extensive authority, the frequency with which they grant injunctions, especially in litigations growing out of labor troubles has excited much comment,⁵⁴ and has become to some extent a political issue.⁵⁵

614. Not Granted in Purely Political Controversies. It is to be borne in mind, that the injunctive remedy has for its primary and legitimate purpose the protection of property rights against irreparable injury. Such rights are clearly distinguishable from the political rights of the citizen, and courts of equity have never undertaken by injunction to prevent the invasion of purely political rights,^{55a} nor to control public officers and tribunals in the exercise of purely legislative or governmental functions, unless specially authorized by law to interfere.⁵⁶ They do, however, enjoin public officers, "who are attempting to act illegally, or without competent authority, to the injury of the public or individuals."⁵⁷

615. Nor to Restrain Crimes. It is well settled that equity will not interfere by injunction to restrain the commission of crimes. To assume such a jurisdiction would be to invade the

(1912), injunction against a former manager's inducing patrons and servants to break their contracts with plaintiff.

⁵³. *Beddow v. Beddow*, L. R. 9 Ch. 89, 47 L. J. Ch. 585 (1878): "In my opinion, having regard to these two Acts of Parliament (Common Law Proc. Act, 1854, and Judicature Act, 1873), I have unlimited power to grant an injunction in any case where it would be right or just to do so; and what is right or just must be decided not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles."

⁵⁴. *The Modern Use of Injunctions*, by F. J. Stimson, 10 *Polit. Sc. Quar.* 189 (1895), and authorities therein cited.

⁵⁵. See California, Laws 1903, ch. 235, prohibiting injunctions in certain cases of trade disputes; *The*

Trade Disputes Act, 1906 (6th Ed. VII.), ch. 47, limiting the tort liability of parties to Trade Disputes.

^{55a}. *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220 (1894); *State v. Alve*, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393 (1899); *Winnett v. Adams*, 71 Neb. 817, 99 N. W. 681 (1904); *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. 868, 5 L. R. A. 334, 25 Am. St. Rep. 540 (1889); *McDonald v. Lyon*, 43 Tex. Civ. App. 484, 95 S. W. 67 (1906); *Green v. Mills*, 69 Fed. 859, 16 C. C. A. 516, 30 L. R. A. 90 (1895); *Giles v. Harris*, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909 (1902).

⁵⁵. *Mann v. County Court*, 58 W. Va. 651, 656, 52 S. E. 776 (1906).

⁵⁷. *Davis v. Am. Society for Prev. Cruelty to Animals*, 75 N. Y. 362, 369 (1873); *People v. Canal Board*, 55 N. Y. 390 (1874).

domain of courts of common law, and to substitute for trial by jury a different form of trial.⁵⁸

Still, a court of equity is not precluded from granting an injunction against threatened wrong-doing simply because it is punishable criminally. "If it would be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights," the wrong-doing may be enjoined, although it is of a character which would subject its author to criminal punishment.⁵⁹

616. Nor to Restrain Libel. In this country there is judicial unanimity that an injunction will not issue to restrain the threat-

58. *Paulk v. Mayor of Sycamore*, 104 Ga. 24, 30 S. E. 417, 41 L. R. A. 772, 69 Am. St. Rep. 128 (1898); *Salter v. City of Columbus*, 125 Ga. 96, 54 S. E. 74 (1906); *Payer v. Village of Des Plaines*, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494 (1887); *Crighton v. Dahmer*, 70 Miss. 602, 13 So. 237, 21 L. R. A. 84, 35 Am. St. Rep. 666, with a valuable note (1893); *Pleasants v. Smith*, 90 Miss. 440, 43 So. 475 (1907); *Davis v. Am. Soc. for Prev. Cruelty to Animals*, 75 N. Y. 362 (1878); *Pre-digested Food Company v. McNeal*, 1 Oh. N. P. 266 (1895); *Arbuckle v. Blackburn*, 113 Fed. 616, 625, 51 C. C. A. 122, 65 L. R. A. 864 (1902), in which Day, J., said: "This is quite a different proposition from enjoining criminal proceedings alleged to be indirectly destructive of property rights. Many criminal prosecutions may affect the property of the person accused.

. . . Every citizen must submit to such accusations, if lawfully made, looking to the vindication of an acquittal and such remedies as the law affords for the recovery of damages. It is often a great hardship to be wrongfully accused of crime, but it is one of the hardships

which may result in the execution of the law, against which courts of equity are powerless to relieve;" In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402 (1888), no power to restrain the mayor and committee of a city from removing a city officer upon charges filed against him for malfeasance in office.

59. *Port of Mobile v. Louisville & N. Ry.*, 84 Ala. 115, 126, 4 So. 106, 5 Am. St. Rep. 342 (1887), injunction against the enforcement of a void city ordinance, which would have worked irreparable injury to the railroad company; *Pratt Food Company v. Bird*, 148 Mich. 631, 112 N. W. 701 (1907), state dairy and food commissioner enjoined from disseminating circulars, which charged that plaintiff's goods were put upon the market in violation of law; *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514 (1891); "That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner:" *Hamilton Brown Shoe*

ened publication of a libel.⁶⁰ "If a court of equity could interfere and use its remedy in such cases, it would draw to itself the greater part of the litigation belonging to courts at law."⁶¹ It would go far, it is said, towards nullifying the constitutional guarantee of the freedom of the press and of the right to trial by jury.⁶²

Nor can an injunction be obtained by showing that the threatened libel will injure plaintiff pecuniarily as well as in reputation.⁶³ If, however, the threatened publication is but part of an illegal scheme of defendant, which has for its chief purpose the

Co. v. Saxey, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622 (1895): "In such case the court does not interfere to prevent the commission of a crime, although that may incidentally result, but it exerts its force to protect the individual's property from destruction, and ignores entirely the criminal portion of the act. There can be no doubt of the jurisdiction of a court of equity in such a case;" In re Debs, 158 U. S. 564, 593, 15 Sup. Ct. 900, 39 L. Ed. 1092 (1895); American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90 (1902); Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169 (1904).

⁶⁰ Singer Manuf. Co. v. Domestic Sewing Mach. Co., 49 Ga. 70, 15 Am. Rep. 674 (1873): "Not that libel or slander is not a wrong, nor the wrong might not be irreparable, but simply because courts of chancery, in the exercise of the extraordinary powers lodged in them, have uniformly refused to act in such a case, leaving parties to their remedy at law;" Christian Hospital v. The People, 223 Ill. 244, 250, 79 N. E. 72 (1906); Covell v. Chadwick, 153 Mass. 263, 26 N. E. 856, 25 Am. St. Rep. 625 (1891); Worthington v. Waring, 157 Mass. 421, 423, 32 N. E. 744, 20 L. R. A. 342, 34 Am. St. Rep. 294 (1892); "the rights alleged

to have been violated, are personal rights as distinguished from rights of property;" Meyer v. The Journeymen Stonecutters' Association, 47 N. J. Eq. 519, 20 At. 492 (1890); Kidd v. Horry, 28 Fed. 773 (1886), and authorities digested by Bradley, J.; Balliet v. Cassidy, 104 Fed. 704 (1900).

⁶¹ Francis v. Flinn, 118 U. S. 385, 6 Sup. Ct. 1148, 30 L. Ed. 165 (1886): "If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel."

⁶² Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 392, 64 N. E. 163, 59 L. R. A. 310 (1902).

⁶³ Mead v. Stirling, 62 Conn. 586, 27 At. 591, 23 L. R. A. 227 (1892): "The wrongful acts for the prevention of which injunctions will be granted are those which affect property or its healthful and beneficial use, and never those which affect reputation merely;" Brandreth v. Lance, 8 Paige (N. Y.), 24, 34 Am. Dec. 368 (1839): "An injunction to restrain a publication can only be granted in cases where the publication will interfere with the complainant's right either of literary or other property, in the subject matter of the publication;" Edison v. Thomas A. Edison, Jr. Chem. Co., 128 Fed. 957 (1904).

destruction of plaintiff's business, or the infliction of irreparable damage upon his property interests, a court of equity will afford him injunctive relief.⁶⁴ Within this class fall cases for the injury to trademarks and trade names by defamatory statements, and for slander of title.⁶⁵ In such cases, however, the complainant will not be granted injunctive relief, when because of his inability to prove special damages he has no remedy at law.⁶⁶

617. In England, the doctrine which prevails in this country has been modified, since the enactment of statutes which give to judges authority to grant injunctions in any case where the form of relief is right and just.⁶⁷ Accordingly, injunctions are granted there, not only after verdict establishing the actionable character of the defamatory publication,^{67a} but before a trial of the defamation action has been had.⁶⁸ An *ad interim* injunction will be granted,

64. Pratt Food Co. v. Bird, 148 Mich. 631, 112 N. W. 701 (1907). The state dairy and food commissioner was enjoined from publishing statements that plaintiff's food preparations for animals were within the terms of an Act of the legislature which required them to be licensed, and warning the public against buying or selling them, on the ground that these false statements would intimidate people from dealing with plaintiff and exclude his business from the State; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421 (1898); American School of Magnetic Healing, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90 (1902); Emack v. Kane, 34 Fed. 46 (1888); Adriance, Platt & Co. v. Nat. Harrow Co., 98 Fed. 118 (1899); George Jonas Glass Co. v. Glass Bottle Blowers' Assoc., 77 N. J. Eq. 219, 79 At. 262, 41 L. R. A. N. S. 445 (1908), and note; State v. Cass Co., 17 N. Dak. 285, 115 N. W. 675, 15 L. R. A. N. S. 331 (1908); Steinert & Seres Co. v. Tagen, 207 Mass. 394,

93 N. E. 584 (1911), injunction against driving wagon through streets with strike placard, after strike had ceased.

65. Supra, chap. XIII, §§ 2 and 3; Atlas Assurance Co. v. Atlas Insurance Co., 138 Ia. 228, 112 N. W. 232 (1907); Pope Automatic Mer. Co. v. McCrum-Howell Co., 191 Fed. 979, 112 C. C. A. 391, 40 L. R. A. N. S. 463 (1911).

66. Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310 (1902); Butterick Pub. Co. v. Typographical Union No. 6 (1906), 100 N. Y. Supp. 292, 50 Misc. 1 (1906).

67. Beddow v. Beddow, L. R. 9 Ch. 89, 47 L. J. Ch. 585 (1878); Quartz Hill Mining Co. v. Beall, 20 Ch. D. 501, 511, 51 L. J. Ch. 874, 46 L. T. 746 (1882).

67a. Trollope v. London B. T. Fed., 12 Times L. R. 373 (1896), injunction, which had been granted, Ibid. 11 Times L. R. 228 (1895), made perpetual.

68. Monson v. Tussauds Limited, (1894), 1 Q. B. 671, 63 L. J. Q. B.

however, only in cases where the statement complained of is clearly libelous,⁶⁹ and is not justifiable,⁷⁰ or privileged,⁷¹ and there is evidence that the defendant intends to continue its publication,^{71a} and that such continued circulation will inflict irreparable or very serious injury upon the complainant.⁷²

It will be seen from the authorities above cited that even in England, the publication of libels is restrained by injunctions only in rare cases.⁷³

By statute, the repetition of a publication of a false statement of fact, in relation to the personal character of a candidate for parliament may be restrained by interim or perpetual injunction by the High Court of Justice.⁷⁴

618. To Restrain Boycotts, Combinations and Conspiracies. It is the employment of injunction to restrain conduct, which is described by these and similar terms, which has been most severely criticised and strenuously opposed. Notwithstanding this opposition and criticism, the courts, both in England and in this country, do not hesitate to grant injunctive relief to the victims of a boycott provided that it amounts to an actionable tort, and that a suit at law for damages would be inadequate.⁷⁵

454, 70 L. T. 335, opinions in Queen's Bench Division; *Collard v. Marshall* (1892), 1 Ch. 571, 61 L. J. Ch. 268, 66 L. T. 248, 8 Times L. R. 265.

69. Cases in last two notes; *London & Northern Bk. v. George Newnes*, 16 Times L. R. 76 (1899); *Punch v. Boyd*, 16 Ir. L. R. 476 (1885).

70. *Monson v. Tussauds Limited*, (1894), 1 Q. B. 671, 63 L. J. Q. B. 454, 70 L. T. 335, opinions in Court of Appeal; *Bonnard v. Parryman*, (1891), 2 Ch. 269, 284, 60 L. J. Ch. 617, 65 L. T. 506.

71. *Searles v. Scarlett*, 8 Times L. R. 562 (1892), 2 Q. B. 56, 61 L. J. Q. B. 573, 60 L. T. 837; *Quartz Hill Gold Mining Co. v. Beall*, 20 Ch. D. 501, 51 L. J. Ch. 874, 46 L. T. 746 (1882).

71a. *Quartz Hill Gold Mining Co. v. Beall*, 20 Ch. D. 501, 509 (1882).

72. *Trollope v. London B. F. Fed.* 11 Times L. R. 228, 72 L. T. 342 (1895), injunction granted; *Lloyds Bank Limited v. Royal British Bank Limited*, 19 Times L. R. 548 (1903), injunction denied.

73. *Coulson & Son v. Coulson & Co.*, 3 Times L. R. 846 (1887).

74. Corrupt and Illegal Practices Prevention Act, 1895 (58 and 59 Vict. Ch. 40, §§ 1 and 3); *Bayley v. Edmunds*, 11 Times L. R. 537 (1895).

75. Supra, cases cited in notes ¶¶ 74-78; *Goldberg, etc. Co. v. Stablemen's Union*, 149 Cal. 429, 434, 86 Pac. 806 (1906), intimating that chap. 235, L. 1903, prohibiting the use of injunctions in certain cases of trade disputes, would be unconstitutional if it forbade an injunction in such a case as was then before the court; *Plant v. Woods*, 176

They deal in the same way with applications for injunctions against every kind of combination ⁷⁶ and of conspiracy,⁷⁷ which has for its object the infliction of unlawful and irreparable injury upon the applicant.

Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330 (1900); *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477 (1893): "A boycott may be defined to be a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts, which tend to violence, and thereby cause him through fear of resulting injury to submit to dictation in the management of his affairs. Such acts constitute a conspiracy, and may be restrained by injunction;" *Walsh v. Assoc. of Master Plumbers*, 97 Mo. App. 280, 71 S. W. 455 (1902); *Alfred W. Booth & Bro. v. Burgess*, 72 N. J. Eq. 181, 65 At. 226 (1906); *George Jones Glass Co. v. Glass Bottle Blowers' Assoc.*, 72 N. J. Eq. 653, 66 At. 953 (1907); *Erdman v. Mitchell*, 207 Pa. 79, 56 At. 327, 63 L. R. A. 534, 99 Am. St. Rep. 783 (1903); *Purvis v. United Brotherhood*, 214 Pa. 348, 63 At. 585 (1906); *Casey v. Cincinnati Typographical Union*, 45 Fed. 135, 12 L. R. A. 193 (1891); *Thomas v. Cincinnati, etc. Ry.*, 62 Fed. 803 (1894); *Lowe v. California State Fed. of Labor*, 139 Fed. 71 (1905), the form of the injunction

is given on pp. 85, 86; *Folsom v. Lewis*, 208 Mass. 336, 94 N. E. 316, 35 L. R. A. N. S. 787 (1911).

⁷⁶ *Jetton-Dekle Lumber Co. v. Mather*, 53 Fla. 969, 43 So. 590 (1907): "If a combination of workmen for their own benefit operate an injury to the property of others, and that combination is clearly against the criminal laws of the State, a court of equity may intervene to protect the property right, even though the criminal courts may also be resorted to for enforcing the penalties imposed. Such seems to be the current holding of the courts in this country. Yet, where there is serious doubt as to the facts alleged constituting a crime, it would seem best to leave the solution of the doubt to the forum appointed by the Constitution directly and specifically for the trial of criminal causes;" *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 23 L. R. A. 588 (1894); *Vegelahn v. Gunter*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. R. 443 (1896); *Southern Ry. Co. v. Machinists' Local Union*, 111 Fed. 49 (1901), combination of strikers resorted to violent picketing; *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155 (1906). "The action of pickets established by strikers may amount to coercion and intimidation of workmen of an employer, and a violation of an injunction against the use of such means although no act is done which would be unlawful if done by a single individual, where the mere

619. Injunction on Behalf of the Government. In a leading case ^{77a} upon this point, the Supreme Court of the United States has held, that the United States have a property in the mails which entitles the government to an injunction against a combination of persons, who are illegally preventing their transportation. Moreover, having constitutionally assumed jurisdiction over interstate commerce carried upon railroads, the government is under a duty to keep these highways free from unlawful obstructions, and may apply to the courts for an injunction against such obstructions, as it may against any public nuisance. Courts are not ousted of their jurisdiction, to grant injunctive relief in such cases, by the fact that the government might employ physical force to abate the nuisance or remove the obstructions; ⁷⁸ nor by the fact that the

number of pickets acting together and their persistent following of the workmen to and from their work, day after day for months, is in itself a constant threat producing fear and alarm among the workmen."

77. *Erdman v. Mitchell*, 207 Pa. 79, 56 At. 327, 63 L. R. A. 534, 99 Am. St. Rep. 783 (1903); *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811 (1897); *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 28 C. C. A. 99, 49 U. S. App. 709 (1897); *Arthur v. Oakes*, 63 Fed. 310, 11 C. C. A. 209, 24 U. S. App. 239, 25 L. R. A. 414 (1894); *Pope Motor Car Co. v. Keegan*, 150 Fed. 148 (1906); *Evenson v. Spaulding*, 150 Fed. 517, 82 C. C. A. 263, 9 L. R. A. N. S. 904 (1907).

77a. *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092 (1895): "It must be borne in mind that this bill was not simply to enjoin a mob and mob violence. It was not a bill to command a keeping of the peace; much less was its purport to restrain the defendants from abandoning whatever employment they were engaged in. The right of any laborer, or any number of laborers, to quit work was not challenged.

The scope and purpose of the bill was only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried. And the facts set forth at length are only those facts which tended to show that the defendants were engaged in such obstruction."

78. *Borough of Stamford v. Stamford Horse Railroad*, 56 Conn. 381, 15 At. 749 (1888). "As a rule, injunctions are denied to those who have adequate remedy at law. Where the choice is between the ordinary and the extraordinary processes of law, and the former are sufficient, the rule will not permit the use of the latter. In some cases of nuisance, and in some cases of trespass, the law permits an individual to abate the one and prevent the other by force, because such permission is necessary to the complete protection of property and person. When the choice is between redress or prevention of injury by force and by peaceful process, the law is well pleased if the individual will consent to waive his right to the use of force, and await its action. Therefore, as be-

conduct of the persons to be enjoined subjects them to criminal punishment. The government, in employing the injunction, is not engaged in suppressing rebellion, or in conducting the political affairs of the country, but simply in protecting property rights, either of the United States or of citizens.

§ 6. THE OBLIGATION OF INJUNCTIONS.

620. Upon Defendants. The earlier English doctrine was that an injunction would issue against those tort feors only who had been brought into court.⁷⁹ At present, however, the injunction may include also the attorneys, agents and servants of a defendant.⁸⁰ And third persons may be punished for contempt, who aid and abet a defendant in committing a breach of the injunction.⁸¹ This is not on the ground that the writ is obligatory upon them, as it is upon the defendant, but that it is harmful to public interests that the course of justice should be obstructed.⁸²

621. Persons Not Served and Not Named. In this country, the practice has grown up of directing the injunction against all persons engaged in the illegal conduct complained of, although some may not be formally named as defendants in the suit, or served with process⁸³ This is done on the principle that if the persons are numerous, certain ones may be made parties defendants as representatives of the class.⁸⁴

tween force and the extraordinary writ of injunction, the rule will permit the latter."

79. *Iveson v. Harris*, 7 Ves. 251, 256 (1802).

80. *Seaward v. Paterson* (1897), 1 Ch. 545, 551, 66 L. J. Ch. 267, 270.

81. *Lewes v. Morgan*, 5 Price, 42 (1817); *Lord Wellesley v. Earl of Mornington*, 181 (1848). In *Hodson v. Coppard*, 29 Beav. 4 (1860), the court refused to extend the injunction to tenants of the defendant.

82. *Seaward v. Paterson* (1897), 1 Ch. 545, 66 L. J. Ch. 267.

83. *Toledo, Ann Arbor & N. M. Ry. v. Pennsylvania Co.*, 54 Fed. 746 (1893); *Ex parte Lennon*, 64

Fed. 320, 12 C. C. A. 134 (1894), *affd.* 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110 (1897); *American Steel & Wire Co. v. Wire Drawers', etc., Union*, 90 Fed. 598, 605 (1898); *Pope Motor Car Co. v. Keegan*, 150 Fed. 148, 151 (1906); *George Jonas Glass Co. v. Glass Bottle Blowers' Assoc.*, 72 N. J. Eq. 653, 66 At. 953 (1907). This practice is criticised by Charles C. Allen, in "Injunction and Organized Labor," *Reports Am. Bar Assoc.*, Vol. 17, p. 299 (1894), and William H. Dunbar, in "Government by Injunction," 13 *L. Quar. Rev.* 347 (1897).

84. *Pickett v. Walsh*, 192 Mass. 572, 590, 78 N. E. 753, 6 L. R. A. N. S. 1067 (1906).

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